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In The
Supreme Court of The United States
October Term 1997

DEAN JENKINS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI
With Appendix

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QUESTIONS PRESENTED

(1) Whether the search of the Petitioner's tractor and trailer violated the Fourth Amendment to the United States Constitution.

(2) Whether the filing of any pretrial motion that does not require a hearing automatically excludes a period of thirty (30) days under § 3161 (h) (1) (J) of the Speedy Trial Act, Title 18, United States Code § 3161 et seq.

(3) Whether the docket entry of a notice of a change of plea excludes the time from the making of the docket entry through the hearing on the plea under § 3161 (h) (1) (I) of the Speedy Trial Act, Title 18, United States Code § 3161 et seq. when no motion or plea is filed for the court to consider.

PARTIES TO THE PROCEEDING

The parties to the proceedings are the petitioner, Dean Jenkins, and the Unites States of America.

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In the Supreme Court of the United States

OCTOBER TERM, 1996

NO.

Dean Jenkins, Petitioner

v.

United States of America

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The Petitioner Dean Jenkins respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in this case.

OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the Sixth Circuit (Apdx. B-4-24)[1] is published in 92 F.3rd. 430 (1996). On October 13, 1996, the court of appeals denied the petition for rehearing and suggestion for rehearing en banc. The order of the District Court denying the petitioner's motion to dismiss under the speedy trial act is unreported

JURISDICTION

The judgment of the court of appeals was entered on August the 13, 1996. The petitioner's petition for rehearing and for rehearing en banc was denied on September 10, 1996. This Honorable Court granted the petitioner and additional sixty (60) days to file his petition for writ of certiorari on December 30, 1996 (App. No. 452) The jurisdiction of this court is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. AMENDMENT IV to the United States Constitution states in revelant part as follows:

* * *

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[1]"Apdx." refers to the separately bound appendix to this petition.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the places to be searched, and the persons or things to be seized.

2. Title 18 U.S.C. 3161 provides, in revelant part:

* * *

(c) (1) In any case in which a plea of not guilty is entered, the trial of the defendant charged in an information or indictment with the commission of an offense shall commence within 70 days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs. If a defendant consents in writing to be tried before a magistrate on a complaint, the trial shall commence within 70 days from the date of such consent.

(h) the following periods of delay shall be excluded in computing the time within which an information or indictment must be filed, or in computing the time within which the trial of any such offense must commence:

(1) Any period of delay resulting from other proceedings concerning the defendant, including but not limited to-

(F) delay resulting from any pretrial motion, from the filing of the motion through conclusion of the hearing on, or other prompt disposition of such motion;

(I) delay resulting from consideration by the court of a proposed plea agreement to be entered into by the defendant and the attorney for the government; and

(J) delay reasonably attributable to any period, not to exceed thirty days, during which any proceeding concerning the defendant is actually under advisement by the court.

STATEMENT OF THE CASE

This is a criminal prosecution commenced in the United States District Court for the Eastern District of Tennessee at Greeneville. The Petitioner was indicted for conspiracy to distribute marijuana and using a facility in interstate commerce to facilitate the carrying on of an unlawful business enterprise involving the possession with intent to distribute marijuana. After a jury trial, the Petitioner was convicted as charged and sentenced to 136 months on the conspiracy charge and 60 months for using a facility in interstate commerce to facilitate the carrying on of an unlawful business enterprise involving the possession with intent to distribute marijuana with both sentences to be served concurrently, for a total sentence of 136 months. A panel of the court of appeals affirmed the convictions and sentence. The Petitioner

filed a petition for rehearing and suggestion for rehearing en banc which was denied by the court of appeals.

QUESTION 1. Prior to trial, the Petitioner filed a motion to suppress which was heard by the Magistrate Judge on April 11, 1994 [Apdx.- E 25-27]. The Petitioner testified that on or about November 15th or 16th 1993 that he was the owner of Black Mountain Motor Lines and that Black Mountain Motor Lines employed James Edward Holt. The Petitioner stated that he owned the trailer that was in the state of Texas on the above date and that he had a policy that prohibited his employees from being in the trailers unless they were loading or unloading the trailers. He stated that they had instructed all of his drivers that no one should be in the trailers because of shortages and damages. The petitioner testified that the trailer was a closed unit and that they did not allow the public in the trailers.

The Petitioner said that when they stopped the tractor trailer rig in Edinburg, Texas, that he was working at his shop in Newport, Tennessee, and that he was nowhere close when they stopped the tractor trailer rig. He stated that Holt was the hired driver for the truck and that he did not know at the time that they had stopped and searched the truck. Jenkins said that his drivers did not have the authority to allow anyone in the trailers and that there should have been a seal on the trailer.

Special Agent Maxey Gilleland with the Tennessee Bureau of Investigation became involved in the investigation after he traveled to South Carolina in March of 1993 and interviewed a cooperating individual. He then came back to Tennessee and began working the case from an undercover standpoint. The investigation revealed that Holt was one of the primary drivers for Black Mountain Motor Lines who would go to Edinburg, Texas and pick up loads of marijuana.

Gilleland met with Juan Sepulveda who explained to him the extent of the operation and indicated that he paid Jenkins approximately $150.00 a pound to transport the marijuana. Sepulveda offered to sell Gilleland from 200 to 300 pounds of marijuana for $600.00 to $800.00 per pound, depending on where he picked up the marijuana. After the conversation with Juan Sepulveda, Gilleland and Agent Pat Howell traveled to the state of Texas in a pick up truck with a false compartment to purchase marijuana.

The informant went to Texas and met with Juan and Gilbert Sepulveda and made arrangements to purchase approximately 200 pounds of marijuana. Gilleland notified authorities in the State of Texas that he was going to be in their jurisdiction and they arranged for him to meet with Sergeant Frank Escalon who helped him in the investigation while he was in Texas.

The informant took the load vehicle to Gilbert Sepulveda to be inspected. Sepulveda stated that the vehicle probably would not make it by the check point in Falfurrias, Texas and told the informant that there was a vehicle from Black Mountain Motor Lines in town that would bring the marijuana back to Tennessee along with marijuana that was going to the Jenkins/Sexton group. Gilleland and other agents began searching for a Black Mountain vehicle in the area. On or about the 14th of November, the agents found a Black Motor Lines Truck and identified the driver as James E. "Spanky" Holt. The vehicle was kept under surveillance 24 hours a day until it left on November 15th or 16th. Gilleland learned that the vehicle would be going to Luke Cold Storage to pick up a legitimate load on November 15th but Holt did not arrive to pick up the load until November 16th. When the agents determined that the vehicle was committed to going North at 10:52 p.m. on November 16th, they stopped the vehicle.

Gilleland said that he was not present when the vehicle was stopped but that he arrived 5 to 10 minutes later. Gilleland did not know if they had searched the vehicle when he arrived, and that he did not participate in the search of the vehicle. He did not know if a decision had been made to stop the vehicle when it left Luke Cold Storage.

Frank Escalon of the Texas Department of Safety said that he first met Agent Gilleland on November 12, 1993 to help

him in an undercover investigation of narcotic trafficking by Black Mountain Motor Lines. Agent Gilleland gave Escalon the names of Juan and Gilbert Sepulveda as the suspects in Texas. Escalon said that they supplied a vehicle to transport approximately 200 pounds of marijuana within two days but the transaction never occurred because the vehicle did not meet the specifications of the suspects. A decision was then made to transport the marijuana on a Black Mountain Motor Line Vehicle. The surveillance of the vehicle continued until around 9:40 or 10:00 p.m. on November 16th.

Escalon stated that he advised Trooper Mario Lopez to initiate a traffic stop based on information that he had received from Agent Gilleland. He stated that the vehicle was stopped approximately 6 miles North of Edinburg, Texas. Escalon stayed in the immediate area after the vehicle was stopped. He stated that they obtained a written consent to search from Mr. Holt to search the vehicle. After they obtained the written consent, Escalon said drug detecting dogs were used and that both dogs confirmed the presence of narcotics. He stated that he participated in the search of the vehicle and recovered approximately 49 bundles (319.3 pounds) which tested positive as marijuana.

During cross examination, Trooper Escalon said that he told Officer Lopez to stop the truck because Agent Gilleland had advised him that the truck was loaded with contraband.

Escalon said he did not have any knowledge of Mr. Holt being stopped for a traffic violation. Escalon was in the area within minutes after the truck was stopped but he did not witness Holt sign a consent to search.

Trooper Mario Lopez of the Texas Department of Public Safety was involved in the stop of the Black Mountain Motors truck on November 16th. Lopez was working on U.S. 281 when Sergeant Escalon advised him of a tractor trailer that was possibly carrying a load of contraband North on U.S. 281. He testified that he stopped the vehicle and obtained Holt's consent to search the vehicle.

Sergeant Escalon had told Lopez to make a traffic stop Lopez did not recall if he had told Holt that he had stopped the vehicle for a burned out tail light nor did he recall if he issued a citation for the burned out light. Trooper Lopez testified that Sergeant Escalon had instructed him to stop the vehicle and to obtain a consent to search the vehicle.

James E. Holt testified that he was the driver of the vehicle stopped. Holt had checked the lights of the vehicle shortly before the stop and there were no lights burned out. Trooper Lopez told Holt that they were stopping him because a tag light was burned out.

Holt said that he did not give permission to search the vehicle and that he told the officer that he did not own the stuff and it was not up to him. Holt signed the consent to

search form because he thought he was signing a citation for the tag light and he did not read the form. No one explained to Holt what he was signing and the form that Holt signed was in very small print (approximately 8 point) which would be very difficult to read during the day in average lighting.

The Magistrate Judge issued his Report and Recommendation on May 19, 1994 recommending that the defendant's Motion to Suppress be denied [Apdx.- F 71-76]. The defendant, Dean Jenkins, timely filed his Notice of Objections to the Report and Recommendation on May 31, 1994 [Apdx.-F 77-86]. On August 2, 1994, the District Court approved the report and recommendation denying defendant s Motion to Suppress [Apdx.-A 1].

The panel of the Court of Appeals found that the petitioner had standing to contest the search but affirmed the lower courts ruling denying the motion to suppress holding that Holt had consented to the search.

The Court of Appeals found that the marijuana had been picked up by Holt on November 14, that the tractor and trailer had been kept under constant surveillance, and that Trooper Lopez had fibbed about his reason for stopping Holt on November 16 (Appx.-B 6).[2]

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[2]The Magistrate Judge found that Holt's testimony that he thought he was signing a traffic citation incredible without making any finding about the ability of an average person to read the small printed

QUESTION 2 and 3. Prior to trial on the indictment, the defendant filed a motion to dismiss the indictment for violation of the Speedy Trial Act which was overruled by the trial court on November 30, 1994 [Apdx.-C 31-34]. The court denied the motion and entered an order stating the court's reasons for overruling the motion [Apdx.-A 2-3].

The facts pertinent to petitioner's speedy trial issue began when the petitioner was indicted on December 8, 1993 along with 12 other co-defendants. On January 26, 1994, the government filed its first superseding indictment and on February 22, 1994 the government filed its second superseding indictment [Apdx.-D 35-65]. The speedy trial clock began to run on May 27, 1994 when the last codefendant appeared in court. The period of time from May 27, 1994 to June 6, 1994 is excludable because of the pending motions, including the defendant's motion to suppress. The period from June 7 to June 17 is excludable because the parties had ten days to file objections to the magistrate's report. The period of time from June 17 to July 17 is excludable because the court had thirty days to decide whether or not to adopt the magistrate's report On July 17,

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form at night in an unlit area. The Court of Appeals ruling that Lopez "fibbed" places in question the ruling that Holt was not a credible witness. Lopez could not dispute telling Holt that he had been stopped for a burned out tail light or that he had issued Holt a citation for the violation.

1994, a Motion to Continue the trial date from July 28, 1994 was filed by defendant's Juan Sepulveda, Gilbert Sepulveda, and Agustin Gomez. The Court granted the Motion to Continue on July 19, 1994 and continued the trial date until August 23, 1994.

The court of appeals ruled that July 20 and 21 were the first two non-excludable days

The Petitioner challenges the ruling of the court of appeals holding that the period of time from the filing of the Notice of Change of Plea until the hearing accepting the plea of two co-defendant's was excludable. The court of appeals reasoning was that a Notice of Change of Plea was in effect a motion wnich required a hearing. There were docket entries made indicating a Notice of Change of Plea but no plea agreement or motion was filed on either occasion. The court of appeals excluded the following time periods because a notice of change of plea entry had been entered on the docket sheet:

1. Notice of change of plea of Boyd Buckner filed on July 22 and heard on August 15[3];

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[3]The court granted the motion of three defendants to continue the trial date on July 19 and Buckner's notice of his change of plea had no effect on the scheduled trial date. Buckner did not file a plea agreement and there was nothing for the court to consider until the court accepted Buckner's plea on August 22.

On October 3, the court entered an order scheduling the trial date for November 30 prior to the notice of Barrett's change of plea. The court had nothing to consider concerning Barrett's plea until the plea was

2. Notice of change of plea of William Barrett filed on November 17 and heard on November 24.

On August 4, 1994, the District Court entered an order disposing of all pending pre-trial motions that were before the court. No other motions were pending then that would toll the running of the Speedy Trial Clock.

On August 15, 1994, the defendant filed a Motion to Seal a copy of the letter sent to Assistant United States Attorney Dan Smith concerning prior bad acts of codefendant Sexton. The court of appeals ruled that this motion excluded thirty days from the time within which the trial of the defendant must commence under the Speedy Trial Act [Apdx.-C 28-30].

ARGUMENT

QUESTION 1. (a) In Pennsylvania v. Labron, 116 S.Ct. 2485 (1996) this court held that if a vehicle was readily mobile and probable cause exists that a warrantless search is permissible under the Fourth Amendment. In that case, Labron and others were observed engaging in a series of drug transactions and later searched the trunk of the automobile where the officers had observed drugs being removed. However, this court did not address the issue of how much time could elapse between the establishment of probable

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entered and accepted by the court on November 21.

cause and the search of a vehicle before a search warrant is required, or if a search warrant is never required to search a vehicle if probable cause exists.

The panel of the court of appeals found that probable cause existed two days prior to the stop of petitioner's tractor and trailer. After probable cause exists to search a vehicle that is not readily mobile, may law enforcement be permitted to wait until the vehicle is readily mobile to circumvent the requirement of a search warrant under the Fourth Amendment. This question is of such public importance because of the effect that warrantless search of vehicles have on the daily activity of any motorist traveling on America's highways.

(b) The court of appeals held that the search was permissible based on the consent of the driver, James Holt. In Schneckloth v. Bustamonte, 412 U.S. 218 (1973); this court held that the prosecutor bears a heavy burden of proving that the consent was freely and voluntary given. In United States v. McCaleb, 552 F.2d 717 (6th Cir.) cert. denied, 439 U.S. 870 (1978). The court of appeals held that the government's proof on this issue must be clear, positive, unequivocal, specific, intelligently given and uninfluenced by duress or coercion. United States v. McCaleb, 552 F.2d at 721.

The courts below could not have found the consent of Holt valid if they had properly considered if Holt had clearly,

positively, specifically, unequivocally, and intelligently consented to the search of the tractor and trailer.

In Illinois v. Rodriguez, 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed2d 148 (1990) this court held that a third party's consent to search is valid if the person has apparent authority to consent to the search.

Both the district court and the court of appeals erred in failing to find, based on the record that James Holt told the officer that he did not have the authority to consent to search of the defendant's trailer. Under these circumstances, apparent authority of the driver should not apply because there is no justification for reliance on apparent authority of Holt's statement.

The courts below failed to properly consider the fact that even if consent is freely and voluntary given, the consent is invalid if it is obtained through subterfuge of law enforcement officials. The record reflects that Officer Lopez testified that he was told to make a traffic stop and obtain consent to search the vehicle. He stated that he did not remember if he told Holt that he was being stopped for a tail light infraction and that he did not remember if he cited the driver for a tail light infraction [Apdx.- E 66-68]. James Holt testified that he was told that he had been stopped for a tag light infraction, that it was dark, that he did not read what he had signed, and that he thought he was signing a traffic citation and not a consent to

search [Apdx.-E. 69-70]. United States v. Davis, 749 F.2d 292 (5th Cir. 1985).

The consent given by James Holt was not freely and voluntary given because Officer Lopez did not explain to Holt what he was signing and that he had a right to refuse to consent to the search. McCaleb supra, 552 F.2d at 721.

QUESTION 2. In Henderson v. United States, 476 U.S. 321, 106 S. Ct. 1871, 90 L. Ed. 2d 299 (1986) this court interpreted the application of 18 U.S.C. 3161 (h) (1) (F), (J). The Henderson court held that subsection (F) excludes time in two situations. When a motion requires a hearing, subsection (F) excludes the time from the filing of the motion and the conclusion of the hearing on the motion regardless of the reason for the delay in conducting a hearing on the motion. The second situation covered by subsection (F) are motions that do not require a hearing and require prompt disposition. The promptness requirement provides a point in time when time ceases to be excluded under the act. Subsection (J) allows the exclusion of a period of time of up to 30 days after the court has received all the papers necessary to decide a motion. However, this court quoted portions of S. Rep. No. 96-212 at 34. The revelant part for consideration in this case reads as follow:

" In using the words 'prompt disposition', the committee intends to make it clear, that in excluding time between filing and the disposition on papers, the Committee does not intend to permit the circumvention of the 30-days, 'under advisement provision contained in Subsection (h) (1) (J). Indeed, if motions are so simple or routine that they do not require a hearing, necessary advisement time should be considerably less than 30 days"

After the decision in Henderson, the Court of Appeals for the Fourth Circuit decided United States v. Parker, 30 F. 3d 542 (4th Cir. 1994). The Fourth Circuit recognized that motions not requiring a hearing that necessary advisement time could be considerably less than 30 days. That court relied on the language in Henderson made reference to language contained in Sen. Rep. Indicating that simple motions would exclude considerably less than 30 days. Parker at 550-551.

The Sixth Circuit held that any pretrial motion automatically required the exclusion of 30 days regardless of the complexity of the motion. The court did not in any way indicate that petitioner's motion to seal the letter to the United States Attorney was anything but a simple motion.

QUESTION 3. The decision by the Sixth Circuit Court of Appeals[4] creates a split of authority on whether the filing of a notice of a change of plea excludes the time of the filing of the notice until the hearing on the plea agreement pursuant to 18 U.S.C. 3161 (h) (1) (I).

In United States v. Velasquez, 890 F. 2d 717 (5th Cir. 1989), the defendant had entered into plea negotiations with the government but no plea agreement was filed for the court to consider. The court of appeals reversed one of defendants convictions holding that 18 U.S.C. § 3161 (h) (1) (I) did not exclude the period of time when there was no plea agreement filed for the court to consider.

United States v. Thurlow, 710 F. Supp. 380 (Dist. Ct Maine, 1989) is a case factually similar to the present case. In Thurlow, the defendant was advised by the court that any change of plea must be entered before December 30. On December 7 the defendant notified the court that there would be a change of plea. The court held a hearing on the notice of change of plea on December 22 and rejected the change of plea because the court found that there was an insufficient

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[4] The court of appeals relied on United States v. Mentz, 840 F.2d 315 (1988) in excluding the period of time of the filing of the notice of a change of plea until the acceptance of the plea. In Mentz at 331, a panel of the court held that the defendant's actions indicating he wished to change his plea did not cause a delay in the scheduled trial and refused to excluded that period of time.

factual basis. The defendant was granted 10 days to file additional motions. The court issued a speedy trial order excluding the period of time from December 23 thru January 9 which included the 10 additional days that the defendant was granted to file additional motions. On February 9, the defendant filed a motion to dismiss for violation of the speedy trial act. In granting the defendant's motion the court stated as follows:

"The Speedy Trial Act requires that, in any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment with the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date later occurs.18 U.S.C. s 3161(c)(1). Under the Act, certain periods of delay are excluded from the tolling of the seventy-day time limit, as indicated by a non-exhaustive list of automatic exclusions included in the Act. 18 U.S.C. s 3161(h)(1)(A-J); United States v. Jodoin, 672 F.2d 232, 238 (1st Cir.1982). If a defendant is not brought to trial within the seventy-day time limit required by section 3161(c)(1), as extended by section 3161(h)(1), the information or indictment must be dismissed on motion of the

defendant. 18 U.S.C. s 3162(a)(2); United States v. Jodoin, 672 F.2d 232.

[1] In its memorandum in opposition to Defendant's motion to dismiss, the Government argues that the Court's rejection of Defendant's change of plea from not guilty to guilty begins on December 23, 1988, a new seventy-day period for purposes of the Speedy Trial Act. Because the Court has excluded the period of time from December 23, 1988 to January 9, 1989, the Government's argument would mean that only thirty includable days have passed on the restarted[5] Speedy Trial Act clock.

In support of its argument, the Government points to section 3161(I) of the Speedy Trial Act, which provides that when a defendant pleads guilty but later withdraws that plea, "the defendant shall be deemed indicted ... on the day the order permitting withdrawal of the plea becomes final." Thus, where a defendant changes a plea to guilty and later withdraws the guilty plea, the withdrawal is treated as an indictment for Speedy Trial Act purposes, and a new seventy-

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[5] Thirty days elapsed between January 10, 1989, and February 9, 1989, the day on which Defendant filed the instant motion to dismiss. Because the time that elapses during the pendency of a motion to dismiss for a Speedy Trial Act violation is excludable, no additional time has accrued since the filing of Defendant's motion on February 9th. 18 U.S.C. s 3161(h)(1)(F); United States v. Stafford, 697 F.2d 1368, 1372 (11th Cir.1983).

day period begins. 18 U.S.C. s 3161(I), United States v. Cordero, 668 F.2d 32 (1st Cir.1981).[6] The Government argues that the situation now before the Court, in which Defendant's guilty plea was rejected instead of withdrawn, is sufficiently analogous to warrant resetting the Speedy Trial Act clock.

The Court does not agree with the Government's analysis. The purpose of section 3161(I) is to prevent defendants from plotting to plead guilty and then withdrawing the plea in order to exploit the Speedy Trial Act time limit. United States v. Carter, 804 F.2d 508, 512 (9th Cir.1986), citing United States v. Mack, 669 F.2d 28, 31-32 (1st Cir.1982). Without section 3161(I), a defendant could withdraw his plea after the expiration of the time limits and move for dismissal. Similarly, he could withdraw the plea

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[6]18 U.S.C. s 3161(I) provides as follows:

If trial did not commence within the time limitation specified in section 3161 [this section] because the defendant had entered a plea of guilty or nolo contendere subsequently withdrawn to any or all charges in an indictment or information, the defendant shall be deemed indicted with respect to all charges therein contained within the meaning of section 3161 [this section] on the day the order permitting withdrawal of the plea becomes final.

This language does not expressly provide for a dismissal sanction under section 3162, but section 3162 is made applicable by the "deemed indicted" language of section 3161(I). United States v. Mack, 669 F.2d 28, 31 (1st Cir.1982).

late in the time limits and leave the Government with little time to prepare its case in order to meet the time limit.United States v. Mack, 669 F.2d at 31, citing A. Partridge, Legislative History of Title 1 of the Speedy Trial Act of 1974 188 (Fed. Judicial Center 1980) (quoting letter of then-Assistant Attorney General William H. Rehnquist dated October 19, 1971). Thus, section 3161(I) was included to thwart a conscious effort on the part of the defendant to gain a dismissal under the Speedy Trial Act by withdrawing a guilty plea prior to sentencing.

The situation in the instant case, in which a defendant's guilty plea was rejected for lack of a sufficient evidentiary basis for the plea, does not fit within the scope of section 3161(I) treatment. Under the scenario section 3161(I) was intended to prevent, the defendant retains the right to withdraw his guilty plea at any time up until sentencing, and may manipulate the timing of his guilty plea and subsequent withdrawal in order to gain a Speedy Trial Act dismissal. In contrast, a defendant has no control over the Court's decision of whether or not to accept defendant's guilty plea, rendering it much more difficult to make strategic use of the plea for Speedy Trial Act purposes.

It is extremely unlikely that a defendant could manipulate the Speedy Trial Act time period by offering a guilty plea, expecting that the judge would reject it. For such

a plan to work, the defendant would have to be sufficiently confident in either the merits of his own case or the weakness of the Government's in order to count on a rejection of the plea by the court. When a defendant offers a guilty plea, the court must satisfy itself that there is a sufficient evidentiary basis to support the plea. In the absence of such evidentiary basis, the plea is rejected. If, however, the defendant could realistically plan his strategy around the court's rejection of his guilty plea, the merits of his case would presumably be strong enough that a guilty plea, in lieu of taking his case to trial, would be an unwise legal strategy. In addition, there is always the possibility that such a plan could backfire. If the court were to unexpectedly accept the guilty plea, the defendant would be forced to either live with the terms of the plea agreement, or face a restarting of the Speedy Trial Act clock by withdrawing the plea prior to sentencing.[7]

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[7] The Court is careful to point out that the Rule 11 hearing is conducted primarily to determine whether or not there is a sufficient factual basis to warrant acceptance of the defendant's guilty plea and to establish the voluntary and knowing nature of the defendant's action. The Court does not suggest that a rejection of a guilty plea at the Rule 11 hearing indicates whether or not the defendant will be found guilty at trial. The Court simply questions why a defendant who is so confident that the court will reject his plea for lack of a factual basis would choose such a risky strategy in lieu of trying the case.

Furthermore, applying section 3161(I) to guilty pleas rejected by the court would chill the defendant's option of entering such a plea. Applying section 3161(I) to rejected guilty pleas would inject a negative factor into a defendant's decision of whether or not to enter a plea, because the defendant would face an additional delay of up to seventy days in the event that the court rejects his plea. If a defendant knows he faces the possibility that the Court will reject his plea, and that the Speedy Trial Act clock will be reset automatically as a result, he may be less likely to plead guilty.

The Speedy Trial Act's purpose is to ensure that a Defendant does not endure an undue delay in his being brought to trial, not to upset the status quo in the federal court plea bargaining arena. In short, the Court disagrees with the Government's argument that Defendant's rejected guilty plea requires a resetting of the Speedy Trial Act clock under section 3161(I).

[2] The Government also urges the Court to exclude from the Speedy Trial Act calculation the period of time from December 7, 1988, when Defendant notified the Court of his intent to enter a guilty plea, until December 22, 1988, when the Court held its Rule 11 hearing on Defendant's plea. The Government argues that a failure to exclude this time period will encourage a defendant to give the court notice of intent to change his plea to guilty, and then simply wait until the

seventieth day has passed to advise the court that he no longer intends to plead guilty while simultaneously moving for dismissal under the Speedy Trial Act.

The Government's argument overlooks the fundamental fact that delay between the time of notice and the time of the Rule 11 hearing in this case was entirely a question of court scheduling, which is not a basis upon which the Speedy Trial Act calculation may be suspended. This is not, as the Government urges, analogous to the filing of a pretrial motion, which stops the Speedy Trial Act clock under section 3161(h)(7). The filing of such a motion stops the clock in order to give the court sufficient time to complete consideration of the substance of the motion and rule accordingly. Here, however, the delay from December 7 to December 23, 1988 was not a result of the Court's need for time to consider the merits. Rather, the delay was caused by the simple fact that this is a very busy Court, and scheduling such a hearing is not something that may always be accomplished immediately. The Act specifically provides that where general congestion of the courts causes a delay, it is not a sufficient basis for exclusion of time from the Speedy Trial Act clock. 18 U.S.C. s 3161(h)(8)(C).[8] Therefore, the

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[8]Section 3161(h)(8)(A) gives the trial judge discretion to grant exclusions of time where the continuance is granted either by the judge on his own motion or on the motion of either of the parties, if the judge

Court may not grant an extension of time accrued under the Speedy Trial Act for the period between Defendant's notice to the Court and the day of the Rule 11 hearing, because the delay was due solely to the Court's scheduling requirements.

No continuance under subparagraph (A) of this paragraph shall be granted because of general congestion of the court's calendar, or lack of diligent preparation or failure to obtain available witnesses on the part of the attorney for the Government [emphasis supplied].

Finally, the Government has argued that two additional days are to be excluded from the Speedy Trial Act calculations. The Government argues that November 23, 1988, on which day the Court issued a pretrial order, and December 7, 1988, on which day Defendant notified the Court of her intent to enter a guilty plea, should be excluded. The Court finds that it need not consider the merits of the Government's argument concerning the exclusion of these dates. Even if the Court were to accept the Government's argument to exclude these two days, a total of seventy-four countable days have elapsed since Defendant's arraignment, calculated as follows:

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finds that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. Section 3161(h)(8)(C), however, creates an exception to subparagraph (8)(A):

November 5, 1988 through November 22, 1988 ..... 18 days
November 24, 1988 through December 6, 1988..... 13 days
December 8, 1988 through December 21, 1988..... 13 days
December 22, 1988, the day on which the Court conducted its Rule 11[9]
January 10, 1989 through February 8, 1989..... 30 days
Total: 74 days

The total of seventy-four countable days since the date of Defendant's arraignment exceeds by four days the maximum delay permitted. The Court thus concludes that this delay violates section 3161(c)(1) of the Speedy Trial Act."

The petitioner submits that the court in Thurlow, correctly applied 18 U.S.C. § 3161 (h) (1) (I) to the facts of that case. That section should not be construed to exclude time under the speedy trial act for the filing of a notice of change of plea that does not affect the trial date. The petitioner further contends that he same principle should be applied in this case and that the petitioner's case should be reversed and remanded with instructions.

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[9] December 22, 1988, the day on which the Court conducted its Rule 11 hearing, is excludable under 18 U.S.C. s 3161(h)(1)(F).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

ORDERS

August 4, 1994 ..... **1**
November 30, 1994 ..... **2**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

UNITED STATES
OF AMERICA

vs. NO. 2-93-CR-62

DEAN JENKINS,
ET AL.

ORDER

After careful consideration of the reports and recommendations of the United States Magistrate Judge [Docs. 357, 358], it is hereby **ORDERED** that the Magistrate Judge's reports and recommendations are **ADOPTED and APPROVED**; that the motion to suppress filed by defendant Dean Jenkins is **DENIED** [Doc. 227]; that the motion to suppress filed by defendant Gilbert Sepulveda is **DENIED**; [Doc. 315]; and that the motion to suppress filed by the defendant Juan Sepulveda is **DENIED**. [Doc. 334].

ENTER:

/s/ Thomas G. Hull
THOMAS G. HULL
UNITED STATES DISTRICT JUDGE

Filed: Aug. 4, 1994

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE AT GREENEVILLE

UNITED STATES OF AMERICA	)	
vs.	)	NO. 2:93-CR-62
DEAN JENKINS, ET AL.	)	

ORDER

This criminal matter is before the Court to consider several pretrial motions filed by the defendants. After careful consideration of the record as a whole, the Court finds as follows:

1. The motion to dismiss the indictment filed by the five remaining defendants for a violation of the Speedy Trial Act is **DENIED**. The defendants mistakenly conclude that the Court was relying on its own motion for excludable time when this trial was reset within the confines of the Speedy Trial Act. However, in fact, the Court calculated Speedy Trial by including time for a government response to the defendants' motions, time for hearing and preparation of a report and recommendation in regard to various motions by the United States Magistrate Judge, ten days for the parties to object to any report and recommendation, and the Court would then have a maximum of 30 days to act on the report and recommendation considering any objections thereto. Therefore, based upon the Court's calculations, Speedy Trial

would run on February 5, 1995, considering the aforementioned time frames, and not considering the Court's rescheduling of this trial.

2. The renewed motion for an Enright hearing filed by the defendant James Edward Holt is **DENIED**, inasmuch as the Court will listen to all the proof in this cause and determine if the jury could find that a conspiracy existed. If so, the Court will advise the jury on the applicable law to use in regard to this defendant. This defendant's motion in limine and for in camera inspection also essentially seeks to exclude all tapes until a conspiracy has been shown. This motion is also **DENIED** for the aforementioned reason.

ENTER:

/s/ Thomas G. Hull
THOMAS G. HULL
UNITED STATES DISTRICT JUDGE

Filed: Nov. 30, 1994

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OPINION AND ORDER

Opinion, August 13, 1996 4

Order, September 10, 1996 24

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1996 FED App. 0263P (6th Cir.)
File Name: 96a0263p.06

No. 95-5535

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DEAN JENKINS,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Eastern District of Tennessee

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Decided and Filed August 13, 1996

Before: MILBURN and BOGGS, Circuit Judges; and BORMAN, District Judge.*

BOGGS, Circuit Judge. Dean Jenkins alleges ten errors in the way that the federal government investigated, prosecuted, tried, and sentenced him for drug trafficking. Two of these warrant a detailed written opinion. For the reasons that follow, we affirm.

I

Jenkins owns a trucking company called Black Mountain Motor Lines ("Black Mountain"). Sometime in 1991, Jenkins grew disillusioned with normal profit margins, built a secret compartment into the trailer of a rig, and began to smuggle marijuana from Texas to Tennessee.

Meanwhile, Agent Gilleland of the Tennessee Bureau of Investigation was trying to catch Juan Sepulvada, who Gilleland believed to be responsible for the shipment of significant amounts of marijuana into Tennessee. Gilleland drove to Texas in a false-bottomed truck, posing as a drug buyer. He met Sepulvada and asked to buy marijuana to take back to Tennessee. Sepulvada was generally willing to sell Gilleland marijuana, but was not impressed with Gilleland's false-bottom truck, which Sepulvada believed would not pass an inspection by the authorities. Instead, Sepulvada suggested that they use a more sophisticated container: the secret compartment in the trailer of Jenkins's Black Mountain rig. He told Gilleland that they would have to pay Jenkins $150 per pound to transport the marijuana. Gilleland agreed to Sepulvada's tactic and Jenkins's price.

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*The Honorable Paul D. Borman, United States District Judge for the Eastern District of Michigan, sitting by designation.

Gilleland notified Agent Escalon of the Texas Department of Safety about the smuggling plan on November 12. The Texas authorities searched the area and located a Black Mountain truck on November 14. By this date, the truck, driven by a Black Mountain employee named James Holt, had already picked up Sepulvada's marijuana. The Texas authorities kept the truck under constant surveillance. Holt drove the truck to pick up a load of carrots in Edinburg, Texas, and, on November 16, began the journey back to Tennessee.

Holt had driven just six miles when he was pulled over by Trooper Lopez of the Texas Highway Patrol. Agent Escalon had instructed Lopez to stop Holt and get consent to search the trailer of the rig for marijuana. Transcript, Suppression Hearing, April 11, 1994, at 35-36. Lopez told Holt that he had stopped him because of a burnt-out tag light. It seems clear from the record, however, that Lopez fibbed. Lopez could not remember telling Holt that a tag light was burnt out, nor could he remember writing Holt a ticket. More important, Holt testified that he had checked his tag lights before leaving Edinburg (perhaps expecting such a ploy), and that all of the lights were operational.

Trooper Lopez and Holt have predictably different accounts of what happened next. Careful reading of the record, however, does leave one with a general picture of what occurred. Lopez gave Holt a written consent form, and asked if Holt would authorize a search of the rig's trailer by signing it. Holt took the form, saying something like: "It's not up to me; I don't own the stuff." Transcript, Suppression Hearing, at 39. Holt then signed the consent form. Although Holt testified that he thought the consent form was only a traffic ticket for a burnt-out tag light, the magistrate judge found this

testimony incredible. Lopez, and other officers who arrived later, searched the trailer and found 319 pounds of marijuana hidden behind the carrots.

Jenkins and various codefendants, including Holt, were indicted on December 8, 1993. Jenkins moved to suppress the marijuana seized from his truck. A magistrate judge held a hearing and recommended a holding that (i) Jenkins lacked standing to object to the seizure, and (ii) Holt consented to the search. The district court adopted the magistrate judge's recommendation on August 4, 1994. On November 27, Jenkins filed a motion to dismiss the indictment on grounds of double jeopardy. On November 30, the day he was scheduled for trial, Jenkins filed a motion to dismiss the indictment for violation of the Speedy Trial Act. The district court denied both motions. Jenkins was eventually convicted, and filed a timely notice of appeal.

We will address two issues. In Part II, we determine whether the court erred in not suppressing the evidence seized after the search of the rig's trailer. In Part III, we determine whether the court erred in denying Jenkins's motion to dismiss the indictment under the Speedy Trial Act. Each of Jenkins's other allegations of error is either frivolous or adequately addressed by the rulings and opinions of the court below.

II

A

This case gives us an opportunity to clarify an earlier opinion in *United States v. Blanco*, 844 F.2d 344 (6th Cir. 1988), concerning the standing of an absentee owner to challenge a search of a vehicle. In *Blanco*, the defendant rented a car, giving both his own name and the name of an "additional driver" on the rental form. The defendant

then immediately gave sole control of the car to the driver, who drove from Florida to Ohio with a load of drugs. We held that the defendant in Florida did not have standing to object to a search of the car in Ohio because he did not have a subjective expectation of privacy in the vehicle. *Id.* at 349. *See California v. Ciraolo*, 476 U.S. 207, 210, 106 S. Ct. 1809, 1811, 90 L.Ed.2d 210, 215 (1986) (standing to challenge search requires a subjective expectation of privacy that society would recognize as legitimate).

The district court apparently read *Blanco* to hold that anyone who entrusts a vehicle to the control of another person cannot have a subjective expectation of privacy in the vehicle. Accordingly, the court held that Jenkins did not have standing to object to the search of the rig because he let his employee, Holt, drive it. We believe that the court's inflexible approach is an incorrect application of the law in this admittedly difficult area. *Blanco* did not establish a per se rule barring any absentee owner from challenging a vehicle search. It merely affirmed the district court's *factual* determination -- reviewing for clear error -- that the defendant in *Blanco*, who had merely rented the car for another to drive, did not have a subjective expectation of privacy in a particular vehicle. *Blanco*, 844 F.2d at 349. *Blanco* in no way abrogates a district court's responsibility to consider the evidence that a defendant offers to prove standing. If the facts of a case indicate a subjective expectation of privacy, as they did not in *Blanco*, the first prong of the standing test is satisfied, *see Ciraolo*, 476 U.S. at 210, 106 S. Ct. at 1811, regardless of how far away a defendant-owner may be from his or her vehicle.

In the suppression hearing below, Jenkins testified that his employees were not allowed into his rigs' trailers except when loading or unloading freight. Transcript, Suppression Hearing, at 2-3. He

also testified that he usually ordered his trailers locked and sealed to guard against shortages and employee theft, although this trailer had inadvertantly been left unlocked and unsealed. *Ibid.* We are uncertain if this testimony was credible, or even if there was other information of which we are unaware that would contradict it. But if the testimony is true, it suggests that Jenkins had a subjective expectation of privacy in the trailer of the rig, even if a third party had physical control of the rig at the time of the search. *See United States v. Powell*, 929 F.2d 1190, 1196 (7th Cir. 1991) (absentee defendant has standing to object to officer's entry into the canopied back end of his pickup truck); *United States v. Infante-Ruiz*, 13 F.3d 498, 501-02 (1st Cir. 1994) (where defendant put a closed briefcase in a friend's car and allowed the friend limited access to it, the defendant "did nothing to indicate [the briefcase's] availability to the public generally nor did his actions betray an intention to forego an owner's normal right to exclude those he wished to exclude"). Because the district court did not address Jenkins's testimony in any manner, we cannot affirm the court's conclusion -- based on a simple analogy to factually distinguishable precedent -- that Jenkins did not have a subjective expectation of privacy in the rig's trailer.

Of course, standing requires more than a subjective expectation of privacy. It also requires that the defendant's expectation be of a type that society recognizes as legitimate. *Minnesota v. Olson*, 495 U.S. 91, 95-97, 110 S. Ct. 1684, 1688-89, 109 L.Ed.2d 85 (1990). Usually, courts apply this part of the standing test by hypothesizing legitimately secret things that could be kept in the searched space. The method depends on the imagination of the lawyers and the court, and both generally have been rather creative. *E.g.*, *Blanco*, 844 F.2d at 350 ("Suppose [the defendant]

had been a little old lady from Cincinnati, driving a rental car to Miami with her life savings in cash. If such a person felt nervous about keeping the money in the glove compartment or under a seat, can we say that society would not be prepared to recognize her expectation of privacy if she chose to hide it in a door panel?"). Other circuits have been less willing to suppose that suspicious containers have legitimate functions. *United States v. Lopez*, 761 F.2d 632, 636 (11th Cir. 1985) ("A secret compartment constructed within the confines of the hull of the ship is totally unlike a personal dufflebag or footlocker in terms of the uses to which it may be put, and the expectations of exclusive control to which it gives rise. We cannot imagine that society would recognize a reasonable expectation of privacy in the use of "dead space" in the hull of a ship, sealed with permanent fiberglass and painted to match the surrounding surfaces, for the legitimate storage of personal items.").

A rig's trailer is a sealed space without windows. An owner's expectation of privacy in the trailer of a tractor-trailer rig is of a type that society would recognize as legitimate. A rig's trailer is a sealed space without windows. Cf. *United States v. Weatherspoon*, 82 F.3d 697, 699 (6th Cir. 1996) (no legitimate expectation of visual privacy in the general interior space of a car because that space is easily viewed from outside). Most of the time, the trailer is locked up against the outside world -- and is opened only when it is being loaded or unloaded. In this sealed, locked space, there might be any number of perfectly legitimate items -- e.g., personal effects being moved, the posters for a new advertisement campaign, dangerous chemicals, tomorrow's newspapers -- each benefitting from reasonable secrecy during transport. *See United States v. Doreste*, 947 F.2d 942 (table), 1991 WL 222116 (4th Cir. 1991) (unpublished) (per curiam)

(absentee owner of tractor-trailer has standing to seek suppression of evidence obtained from search of rig). Nor are we moved by the Eleventh Circuit's distaste for "secret compartments." If the government has concerns about its ability to search such spaces, the proper way to meet those concerns is by tailoring substantive search and seizure law -- not by denying a person with an expectation of privacy the right to challenge the search altogether.

Jenkins's standing to object to the search of his trailer becomes all the more important because, under the precedent of at least one circuit, it is unclear if the driver of a rig has standing to object to a search of his boss's property. *United States v. Torres*, 32 F.3d 225, 230 (7th Cir. 1994) (driver does not have legitimate expectation of privacy in detached trailer being hauled by truck). *See also United States v. Frazier*, 936 F.2d 262, 265 (one who denies a relationship to the contents of a container does not have standing to object to search of it). Although it is certainly possible for no one to have standing to object to the search of a container (e.g., when the container has been abandoned by everyone), it seems wrong to take standing from Jenkins on the theory that he has given Holt too much control over the rig if Holt himself does not have standing because he has been given too little control.

For these reasons, we cannot affirm the district court's standing ruling on the basis that, even if Jenkins had a subjective expectation of privacy, that expectation was illegitimate.

B

After holding that the district court erred in denying a party standing to move for the exclusion of evidence, we would normally remand. However, the district court's admission of the evidence rests

on an adequate alternative ground: that the search was reasonable because Holt consented.

A search without a warrant is "per se unreasonable under the Fourth Amendment subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). One of those "well-delineated" exceptions is the consent of the person searched. An officer with consent needs neither a warrant nor probable cause to conduct a constitutional search. *Schneckloth v. Bustamonte*, 412 U.S. 218, 219, 93 S. Ct. 2041, 2044, 36 L.Ed.2d 854 (1983).[1] When one person consents to a search of property owned by another, the consent is valid if "the facts available to the officer at the moment . . . warrant a man of reasonable caution in the belief that the consenting party had authority over the premises." *Illinois v. Rodriguez*, 497 U.S. 177, 188, 110 S. Ct. 2793, 2801, 111 L.Ed.2d 148 (1990) (quoting *Terry v. Ohio*, 392 U.S. 1, 21-22, 88 S. Ct. 1868, 1880, 20 L.Ed.2d 889 (1986) (other citations omitted)). For a third party to have "authority" over a space he does not own, the owner must have assumed the risk that the third party would consent to a search:

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[1]Consent is not valid when it is obtained during an unconstitutional seizure of the person. Although Lopez's stated reason for the traffic stop -- the broken tag light -- is patently bogus, *see United States v. Ferguson*, 8 F.3d 385 (6th Cir. 1993) (probable cause needed to stop automobile for traffic infraction), the magistrate judge properly held that Lopez's stop was permissible under *Terry v. Ohio*, 392 U.S. 1, 21, 88 S. Ct. 1868, 1879, 20 L.Ed.2d 889 (1968), because Lopez had a reasonable suspicion that Holt was hauling drugs. *See United States v. Garza*, 10 F.3d 1241, 1245 (6th Cir. 1993) (permitting *Terry* stop of vehicle and brief detention of driver based upon a reasonable suspicion that driver was transporting drugs).

> [Common authority is] mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

United States v. Matlock, 415 U.S. 164, 171 n.7, 94 S. Ct. 988, 993 n.7, 39 L.Ed.2d 242 (1974). The critical facts, however, are not the actual relationship between the consenter and owner, but how that relationship appears to the officer who asked for consent.

The district court did not address many of Jenkins's important factual allegations concerning the context of Holt's alleged consent. Because we are faced with the question of whether remand is necessary on this issue, we will take the unaddressed factual allegations as true for the moment. Trooper Lopez knew at the time of the search that Holt was hauling a load that did not belong to him. Trooper Lopez also heard Holt say "It's not up to me" in response to Lopez's request that Holt sign the consent form. However, Holt immediately signed the form. Jenkins does not allege that Holt told Lopez that the company had a policy against drivers authorizing searches, nor does he allege that Lopez somehow knew that Black Mountain drivers could not open up the trailer compartment during a run. Further, there was no lock or seal on the trailer door to indicate that the driver was forbidden to open the trailer.

It is obvious that a police officer given certain facts does not have discretion to decide whether these facts are legally sufficient to constitute "authority." *Cf. United States v. Brown*, 961 F.2d 1039 (2d Cir. 1992) ("*Rodriguez* would not validate . . . a search premised on an erroneous view of the law."). But an officer does have

discretion to interpret the factual implications of words in light of the context in which those words are spoken. The words, "It's not up to me, I don't own the stuff," could have a variety of meanings, depending on the gestures, attitude, and situation of the speaker. As an appellate court, we are too far from the context of the words to recreate the scene adequately -- and trying to do so would result in our supplementing the record with our imagination. The most we can ask is if the officer's interpretation of the spoken words was reasonable in light of the contextual information that the record does contain. Approaching the problem in this manner, it was reasonable for Trooper Lopez to interpret Holt's words as simple acquiescence to the request for consent. Nothing Holt said or did would necessarily have put a reasonable officer on notice that Holt did not have the authority to consent to a search of his boss's company's property.

In order to clarify the type of statements to an officer that would be necessary to put the officer on notice of an apparent consenter's lack of authority over a space, it is useful to identify three categories of situations. In the first class of situations, an officer would *never* be justified in believing that the consenter has authority, regardless of what the consenter says. An obvious example is where the officer is aware that the consenter has no rights to the property and no authority to consent, for example, asking the mailman, whom the officer sees delivering a letter, for consent to search a house. Another is where the consenter is obviously only a custodian with limited authority over a particular space, for example, a hotel clerk. *Illinois v. Rodriguez*, 497 U.S. at 188, 110 S. Ct. at 2801 (an officer cannot reasonably believe that a hotel clerk has authority to consent to search of a guest's room).

In the second set of situations, a reasonable officer would usually think that the consenter does *not* have authority, but the officer could be justified in thinking otherwise if the consenter provides additional information indicating common authority. For example, an officer usually cannot assume that a landlord has authority to consent to search of property used by a tenant, *Chapman v. United States*, 365 U.S. 610, 81 S. Ct. 776, 5 L.Ed.2d 828 (1961), but if the landlord asserts that he stores property or occasionally lives with the tenant, then a reasonable officer may be justified in assuming that the consenter has common authority. *United States v. Yarbrough*, 852 F.2d 1522, 1533-34 (9th Cir.) (landlord stored furniture on property, sometimes slept there, had a spare key), *cert. denied*, 488 U.S. 866, 109 S. Ct. 171, 102 L.Ed.2d 140 (1988); *United States v. Hall*, 979 F.2d 77, 79 (6th Cir. 1992) (owner of room rented to defendant kept personal property in the room, the room was never locked, and "there was never an agreement or understanding between him and [the defendant] that he was not to go into the room"). In such cases, a simple "yes" to a request to search means "no"; but an elaborate "yes" describing a basis for common authority means "yes." (We do not mean to imply that the consenter's words are the only basis for the additional information that makes "yes" convincing -- an officer is justified in relying on his own observations, or believable statements by others, concerning the scope of the consenter's authority over a space.)

In the third category of situations, a reasonable officer would usually assume that a person in the position of the consenter *does* have authority over the space. This is the general rule for people in possession of movable containers, *e.g. Frazier v. Cupp*, 394 U.S. 731, 740, 89 S. Ct. 1420, 1425, 22 L.Ed.2d 684 (1969), or someone

who comes to the door of a house after the police knock, *e.g.*, *United States v. Matlock*, 415 U.S. 164, 170-71, 94 S. Ct. 988, 992, 39 L.Ed.2d 242 (1974). Of course, if the consenter provides additional information, the context may change in such a manner that no reasonable officer would maintain the default assumption. *See United States v. Salinas-Cano*, 959 F.2d 861, 864-65 (10th Cir. 1992) (girlfriend cannot consent to search of boyfriend's bag); *United States v. Most*, 876 F.2d 191, 199-200 (D.C. Cir. 1989) (store employee cannot consent to search of bag left in his custody by defendant).

One circuit has already held that the consent of the driver of a tractor-trailer rig falls in this third category, *United States v. Gonzalez-Basulto*, 898 F.2d 1011, 1012-13 (5th Cir. 1990) (upholding search of tractor-trailer because driver consented with simple "yes"), and we agree. *See also United States v. Mari*, 47 F.3d 782, 783 (6th Cir. 1995) (assuming driver has authority to consent to search of truck owned by third party). The generic relationship between the owner of a rig and its driver is characterized by a considerable grant of authority to the driver. The driver has complete control of the tractor part of the rig, and almost always has keys to the trailer. The driver is typically allowed to enter the trailer on the occurrence of any of a certain number of conditions: loading, unloading, an inspection after an ominous noise, or an emergency. Moreover, the driver may actually be the owner of the rig, or someone with a position in the trucking company that is the practical equivalent of an owner. Therefore, when a driver consents -- an act that suggests some authority to consent -- a police officer is not required to run down a check list of questions about the details of the driver's relationship to his rig.

One can argue that the ability to enter a space upon the occurrence of a specified event is not the legal equivalent of joint control. Hotel management has the same type of *custodial* access to a hotel room, and there is little doubt that a simple "go ahead, I don't live there" from the manager would be insufficient to justify search of a hotel room. *Illinois v. Rodriguez*, 497 U.S. at 188, 110 S. Ct. at 2801. However, we believe that the discrepancy in the amount of custodial access necessary to constitute "joint control" in the two situations is acceptable in light of the differences between the trailer of a tractor-trailer rig and a hotel room. A trailer is a moving container sent out onto the highway system, necessarily susceptible to a variety of regulations, weighings, and inspections, and constantly risking discovery by loading, unloading, search, or accident. A hotel room is a residence, however temporary, and our search and seizure law traditionally has protected a person's residence more vigorously than other, more public, places. *See, e.g., United States v. Rem*, 984 F.2d 806, 812 (7th Cir.) ("[T]he privacy interests of people who are in transit on 'public thoroughfares are substantially less than those that attach to fixed dwellings.'") (citations omitted), *cert. denied*, 510 U.S. 913, 114 S. Ct. 300, 126 L.Ed.2d 248 (1993).

For these reasons, we hold that a request to the driver of a rig to search the rig's trailer is firmly within the third of the three categories outlined above. That means that an officer is justified in thinking that the driver has authority to consent unless the officer knows (or is told) other information indicating that the usual assumption is incorrect. On the facts of this case, we do not believe that Holt's quick statement, "It's not up to me; I don't own the stuff" -- said while he was signing the consent form -- was sufficient to put Trooper Lopez on notice that Holt did not have authority to consent.

This is not a case where the driver said: "Sorry, there is a company policy that forbids me from allowing you to search the trailer. Call my boss at 1-800-GOSEARCH." We also note that the absence of a lock-seal on the trailer door further supports the officer's assumption.

Because a reasonable officer in Trooper Lopez's position could have thought Holt had authority to consent to a search of the trailer, the consent validates the otherwise unreasonable search. We therefore affirm the denial of the motion to suppress, even though the district court erred in holding that Jenkins had no standing to bring the motion.

III

Jenkins also contends that the district court erred in not granting his November 30, 1994, motion to dismiss under the Speedy Trial Act, 18 U.S.C. § 3161 *et seq.* The Act requires dismissal of a criminal case, with or without prejudice, if the defendant is not tried seventy days after his indictment or the date he first appears in court, whichever date last occurs. *See generally United States v. Mentz*, 840 F.2d 315, 324-26 (6th Cir. 1988). Jenkins and the government agree that (i) Jenkins's speedy trial clock began to run on May 27, 1994, when the last of his codefendants appeared in court for the first time, and (ii) Jenkins was tried on November 30, 186 days later.

Once the defendant establishes a prima facie case that the government violated the Act (a simple matter of producing a calender and showing that more than seventy days have passed since the indictment (or first appearance) and trial has yet to begin), the government has the burden of proving excludable time by a preponderance of the evidence. *Mentz*, 840 F.2d at 326. A court should exclude all the days during which it is waiting to receive

information necessary to decide a pending pre-trial motion. If the motion requires a hearing, the entire time from the filing of the motion through the date of the hearing is excludable. 18 U.S.C. §3161(h)(1)(F). *Henderson v. United States*, 476 U.S. 321, 106 S. Ct. 1871, 90 L.Ed.2d 299 (1986). *See also id.*, 476 U.S. at 331, 106 S. Ct. at 1877 (court should exclude days during which it is waiting to receive supplemental filings after a hearing). If the motion did not require a hearing, a court should exclude all the days during which it is waiting for filings from the parties. *Ibid.* *Regardless of whether a motion requires a hearing or not*, after the court receives all the information necessary to decide a motion, a maximum of thirty days can be excluded on the theory that the court has taken the matter "under advisement." 18 U.S.C. § 3161(h)(1)(J); *Mentz*, 840 F.2d at 327: *United States v. Moran*, 998 F.2d 1368, 1371 (6th Cir. 1993).

In its briefs, the government tries to meet its burden to show 116 excludable days by contending that the entire period from April 11, 1994, to November 23, 1994, is excludable because the court was considering a motion by one of Jenkins's codefendant's to use a jury questionnaire. Appellee's Br. at 14-15. The government's position would be correct if the court had scheduled a hearing on this motion for November 23, or if the court was waiting until that date for submissions from the parties necessary to decide the motion. However, nothing in the record indicates that a motion to use a jury questionnaire requires a hearing or additional submissions by the parties. The motion was first brought before the magistrate judge, who deferred to the district court for a ruling on the motion, on April 11. Since no new submissions were required to resolve the motion, only thirty days from the time the district court received the relevant

materials from the magistrate are excludable under the Act. These thirty days expired on May 11 -- and the motion to use a jury questionnaire is therefore irrelevant in deciding how many days after May 11 are excludable.

The district court had no better basis for dismissing Jenkins's motion. It cryptically held:

> [T]he Court calculated Speedy Trial by including time for a government response to the defendants' motions, time for hearing and preparation of a report and recommendation in regard to various motions by the United States Magistrate Judge, ten days for the parties to object to any report and recommendation, and the Court would then have a maximum of 30 days to act on the report and recommendation considering any objections thereto. Therefore, Speedy Trial would run on February 5, 1995, considering the aforementioned time frames . . . .

JA 418 (Order, Nov. 30). The court is correct to assert that the ten-day period in which the parties may object to a magistrate's report, as well as the first thirty days in which the court is deciding whether to accept the magistrate judge's report, are excludable. *United States v. Andress*, 943 F.2d 622, 626 (6th Cir. 1991). However, at least according to our reading of its docket sheet, the district court decided to adopt the last magistrate judge's report and recommendation relating to Jenkins's case on August 4, 1994. Therefore, the district court's rationale cannot explain the period of time between August 5, 1994, and Jenkins's trial on November 30, 1994. During this period, the district court twice postponed Jenkins's trial, on August 15 and on October 3, without finding the postponement necessary "in the interests of justice" pursuant to 18 U.S.C. § 3161(h)(8). Obviously,

neither the government nor the court can now exclude this period on the theory that a delay was necessary for proper resolution of Jenkins's case. *United States v. Crane*, 776 F.2d 600, 606 (6th Cir. 1985).

Our own calculation, however, does result in (barely) enough excludable days to avoid reversing the district court's denial of Jenkins's motion to dismiss. The period from May 27, when the speedy trial clock began to run, to June 6 is excludable because of a variety of pending matters, including motions to suppress and motions *in limine* made by the defendants. *See* District Court Docket Sheet of October 23, 1995, at 54-55. June 6 itself is excludable because the magistrate issued his last report and recommendation on that date. The ten-day period from June 7 to June 16 is excludable because the parties had ten days to file objections to the magistrate's report, which they did not do. *Andress*, 943 F.2d at 626. The thirty-day period from June 17 to July 17 is excluded because the district court had thirty days after the ten-day objection period to decide whether or not to adopt the magistrate's report. *Ibid.*

July 18 is excluded because, on that day, three defendants filed a motion to continue the trial date. The court granted that motion on July 19, which is also excludable. July 20 and 21 are the first and second non-excludable days, as no motion requiring a hearing was pending before the court, and no other motion had been pending before the court for less than thirty days. On July 22, a defendant, Buckner, filed a notice of change of plea and a change of plea hearing was set for August 15. Since a change of plea is a motion requiring a hearing, the entire amount of time between July 22 and August 15 is excludable. *See Mentz*, 840 F.2d at 330-32 (defendant's notice of intent to change plea tolls clock). Therefore,

between May 27 and August 15, only two days of the statutory speedy trial period had passed.

On August 15, Jenkins filed a Motion to Seal a copy of a letter that he sent to the United States Attorney's office relating to "prior bad acts" of a codefendant. Jenkins writes in his brief to this court, without citation, that "the above motion should not toll the running of the time in which the defendant must be tried." Appellant's Br. at 28. Jenkins may be arguing that the motion is simply not important enough to toll the speedy trial clock, but there is no authority for excluding some pretrial motions on the basis that they do not require a significant amount of thought or attention by the court. *See Mentz*, 840 F.2d at 327 n.25 ("Congress could have attacked the many problems raised by the different varieties of pretrial motions and given separate consideration to them. Wisely, it avoided such a morass and extended the exclusion to 'any pretrial motion,' without distinguishing among them"). The defendant's motion was not granted until November 23. Although the entire period that the district court took to decide the matter is not excludable, the first thirty days clearly are. The Motion to Seal thus results in the exclusion of the thirty days from August 16 to September 15.

From September 16 to October 27, there was no motion requiring a hearing pending before the court and no other pretrial motion had been pending before the court for less than thirty days. Therefore, the 42 days between and including these dates are not excludable under the Speedy Trial Act. Our running total of non-excludable days: 44.

On October 28, either the government or a codefendant (it is unclear on the record) moved to have a codefendant transported to a

polygraph facility. The court granted the motion on the same day, and that day is therefore excludable.

From October 29 to November 16, there were no motions requiring a hearing pending before the court and no other pretrial motion had been pending before the court for less than thirty days. Therefore, these 19 days are not excludable under the Speedy Trial Act. Our running total: 63.

On November 17, another defendant filed a notice that he wished to change his plea. The court held a hearing and accepted the new plea on November 21. These dates and the time in between them are excludable.

From November 22 to November 26, no motions had been pending before the court for more than thirty days. These five days are not excludable. On November 27, Jenkins filed a variety of motions, including a Motion to Dismiss Based on Double Jeopardy Grounds. JA 66 (docket item no. 484). The parties do not dispute that there was motion activity on each of the remaining days before trial. Our final total: 68 days.

Because only 68 non-excludable days had expired before Jenkins's trial, it is unnecessary to reverse the trial court's denial of Jenkins's November 30 Motion to Dismiss for Violation of the Speedy Trial Act -- despite the inadequacy of the government's or the district court's response to Jenkins's almost-meritorious claim.

IV

Although the district court made two serious errors concerning the trial of Dean Jenkins, for the reasons discussed above, neither error affected the outcome of his case. His conviction and sentence are AFFIRMED.

No. 95-5535

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DEAN JENKINS,

Defendant-Appellant.

Before: MILBURN and BOGGS, Circuit Judges; and BORMAN, District Judge.*

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green

Clerk

Filed: September 10, 1996

*The Honorable Paul D. Borman, United States District Judge for the Eastern District of Michigan, sitting by designation.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

MOTIONS

Motion To Suppress Evidence 25

Defendant's Jenkins Motion To Seal Letter To U.S. Attorney 28

Motion To Dismiss Indictment For Violation of Speedy Trial Act 31

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

UNITED STATES
OF AMERICA

vs. DOCKET NO. CR-2-93-62

DEAN JENKINS

MOTION TO SUPPRESS EVIDENCE

Comes the defendant, Dean Jenkins, by and through counsel, and moves this Honorable Court, pursuant to the Fourth Amendment to the Constitution of the United States, to suppress the following evidence seized on November 16, 1993 as a result of the search of one (1) 1985 Peterbilt leased to defendant and the search of one (1) 1985 Great Dane, refrigerated, Thermo-King trailer belonging to the defendant. In support of defendant's motion to defendant would show unto this Honorable Court as follows:

1. During search of the aforesaid trailer approximately 312 pounds of marijuana was seized and the defendant specifically moves to suppress said marijuana as evidence in this cause.

2. Defendant would show that the search of his property was conducted without a search warrant and without

probably cause to support a warrantless search of his property. See Donovan v. Dewey, 454 U.S. 594, 69 LEd.2d 262, 101 S. Ct. 2534.

3. Defendant further alleges that the stop of his vehicle for a tail light violation was a pretextual stop by officers that was used to justify the search of defendant's tractor and trailer. See United States v. Jones 452 F.2d 884 (CA8 Mo)

4. Defendant would show that the search was not consented to and that the if the government alleges defendant James Holt consented that defendant would show that Holts' consent was invalid because of the pretext stop. See United States v. Gonzazles 763 F2d 1127 (CA10 NM).

5. Defendant would show that the search of his property violated his rights under the Fourth and Fourteenth Amendment to the United States Constitution.

WHEREFORE, defendant prays that this Honorable Court issue an order suppressing all evidence illegally an unconstitutional obtained and that the defendant have such other further and general relief to which he may show himself entitled to upon a hearing of this cause.

Respectfully submitted,
Dean Jenkins

BY: /s/ David B. Hill
Attorney for Defendant
301 E. Broadway

Newport, Tennessee 37821
Phone: (615) 623-0375

CERTIFICATE OF SERVICE

I certify that I have delivered a true and exact copy of the foregoing motion on Assistant United States Attorney Dan Smith by U.S. Mail postage pre-paid to 208 Sunset, Suite 509, Johnson City, Tennessee 37604.

This is the 24th day of March, 1994.

/s/ David B. Hill

David B. Hill

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

UNITED STATES
OF AMERICA

PLAINTIFF

VS. NO. CR-2-93-62

DEAN JENKINS

DEFENDANT

DEFENDANT'S JENKINS MOTION TO SEAL LETTER TO U.S. ATTORNEY

Comes the defendants, by and through counsel and moves this Honorable Court to issue an order keeping the letter from defendants' attorney to Assistant U.S. Attorney Dan Smith under seal until this cause is submitted to a jury after the trial of the issues in this cause. In support of said motion, counsel for defendant would show unto this Honorable Court as follows:

1. Counsel for defendant has written a letter assistant U.S. Attorney Dan Smith indicating impeachment and exculpatory evidence that is required to be revealed to the defendant in the event that Defendant, Gordon Sexton,

testifies for the prosecution (a copy of said letter is attached hereto as Exhibit "A" and fully incorporated as though fully set out verbatim herein).

2. Counsel for defendant felt that it was necessary to make the Court aware of the extent of the impeachment and/or exculpatory evidence that the Government should produce in the event that defendant Sexton testifies for the government.

3. Defendant would show that the disclosure of his request would be highly prejudicial to both the prosecution and the defense. Defendant submits that the contents of said letter would be more damaging to his defense than it would be to the prosecution because it would allow the prosecution and the press to reveal impeachment and exculpatory evidence to the press prior to the trial of this cause which would lessen the impact of the impeachment of the government's witness.

Respectfully submitted
Dean Jenkins

BY: /s/ David B. Hill

David B. Hill
Attorney for Dean Jenkins
301 E. Broadway
Newport, Tennessee 37821
Phone: (615) 623-0375

CERTIFICATE OF SERVICE

I certify that I have mailed a true and exact copy of the foregoing reply to Mr. Dan Smith, Assistant United States Attorney, to his office at 208 Sunset, Suite 509, Johnson City, Tennessee 37760 by placing the same in the U.S. Mail postage pre-paid.

This the 13th day of August, 1994.

/s/ David B. Hill
David B. Hill

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

UNITED STATES OF AMERICA	)	
vs.	)	NO. CR-2-93-62
DEAN JENKINS JAMES EDWARD HOLT JUAN SEPUVELDA, GILBERTO SUPULVEDDA & AGUSTIN GOMEZ	)	

MOTION TO DISMISS INDICTMENT
FOR VIOLATION OF SPEEDY TRIAL ACT

Comes the defendants, by and through their undersigned attorneys, and move this Honorable Court to dismiss the indictment in this cause against the above captioned defendants for violation of the Speedy Trial Act, 18 U.S.C. § 3161(c)(1). The defendants submit that it is undisputed by the record in this cause that they were not tried with the 70 day period as required by law.

Defendants specifically allege that the Speedy Trial clock began to run on August 23, 1994 and that no other motions were made by defendants until defendant Dean Jenkins Motion that was filed on November 27, 1994 that would toll the running of the speedy trial clock.

The record of this case reflects an order dated August 15, 1994 continuing the case from August 23, 1994 until October 18, 1994 and a Order dated October 3, 1994 continuing the trial date from October 18, 1994 until November 30, 1994. Defendants would show that the entire period of time from August 23, 1994 to November 27, 1994 is not excludable under the Speedy Trial Act because both Orders were entered on the Court's own Motion and both Orders failed to comply with said Act in that the Court failed to set forth in the record the language of 18 U.S.C.S. § 3161(8)(A) which states as follows (a copy of said orders are attached hereto as collective Exhibit "a" and fully incorporated as though fully set out herein):

> **"Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth in the record, either orally or in writing, its reasons for finding that the ends of justice served by the granting of**

such continuance outweigh the best interests of the public and the defendant in a speedy trial.

In addition, defendants contend that the period of time from arraignment until the filing of pre-trial motions is excludable under the Speedy Trial Act and that time in excess of thirty days in deciding motions is not excludable. See: **United States v. Moran**, 998 F2d 1368 (6th Cir. 1993).

For the foregoing reasons, defendants pray that this cause be dismissed with prejudice pursuant to 18 U.S.C.S. 3162(a)(2) as to these defendants.

Respectfully submitted,

BY: /s/ Eddie De La Garza
Eddie De La Garza
Attorney for Defendants,
Juan Sepuvelda,
Gilberto & Agustin Gomez
Texas Bar No. 05646875
P.O. Box 1161
Edingburg, Texas 78540
Phone: (210) 682-1595

BY: /s/ Terry E. Hurst
Terry E. Hurst
Attorney for James Holt
331 E. Broadway
Newport, Tennessee 37821
Phone: (615) 623-1573

BY: /s/ David B. Hill
David B. Hill
Attorney for Dean Jenkins
301 E. Broadway
Newport, Tennessee 37821
Phone: (615) 623-0375

CERTIFICATE OF SERVICE

I certify that I have hand delivered a true and exact copy of the foregoing Motion to Dismiss to Mr. Dan Smith, Assistant United States Attorney.

This the 30th day of November, 1994.

/s/ Eddie De La Garza
Eddie De La Garza

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

SUPERSEDING INDICTMENT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

UNITED STATES OF AMERICA	)	
	)	
vs.	)	NO. CR-2-93-62
	)	
DEAN JENKINS,	)	JUDGE HULL
GORDON SEXTON,	)	
JUAN SEPULVEDA,	)	
GILBERT SEPULVEDA,	)	
AGUSTIN GOMEZ,	)	
WILLIAM BARRETT,	)	
ADOLPHUS BOYD BUCKNER,	)	
JAMES CHANDLER,	)	
MELVIN DEADRICK,	)	
GEORGE GROVER JOHNSON,	)	
GARY KELLEY,	)	
SHERRY KELLEY,	)	
CHARLIE LEE WILLIAMS,	)	
JAMES EDWARD HOLT, aka SPANKY HOLT	)	

SUPERSEDING INDICTMENT

COUNT I

The Grand Jury charges that during approximately the month of November 1991 and continuing to on or about

December 21, 1993, within the Eastern District of Tennessee, and elsewhere, the defendant, GORDON SEXTON, did knowingly and intentionally engage in a continuing criminal enterprise in that he violated Title 21, United States Code, Sections 841(a)(1) and 846 as alleged in but not limited to Counts II through XXXI, but not including Counts IV, XI, XVIII and XXIII, which are incorporated herein by reference and which violations were part of a continuing series of violations undertaken by the defendant GORDON SEXTON, in concert with at least five other persons with respect to whom the defendant, GORDON SEXTON, occupied a position of organizer, a supervisory position, and a position of management, and from which the defendant GORDON SEXTON, obtained substantial income and resources.

FORFEITURE

All property of any kind which constitutes either the profits or proceeds obtained by the defendant GORDON SEXTON, from engaging in the continuing criminal enterprise, and which constitutes any of his interest in, claims against, and property and contractual rights of any kind which afforded him a source of influence over, such a continuing criminal enterprise, to be forfeited.

[21 U.S.C. §§ 848 AND 853]

COUNT II

The Grand Jury further charges that during

approximately the month of November, 1991 and continuing to on or about December 21, 1993, within the Eastern District of Tennessee, and elsewhere, the defendants, DEAN JENKINS, GORDON SEXTON, JUAN SEPULVEDA, GILBERT SEPULVEDA, AGUSTIN GOMEZ; WILLIAM BARRETT, ADOLPHUS BOYD BUCKNER, JAMES CHANDLER, MELVIN DEADRICK, GEORGE GROVER JOHNSON, GARY KELLEY, SHERRY KELLEY, CHARLIE LEE WILLIAMS, JAMES EDWARD HOLT, aka SPANKY HOLT, and other persons and coconspirators and unindicted coconspirators known and unknown to the Grand Jury did knowingly and intentionally combine, conspire, confederate and agree with each other and with diverse other persons to commit the following offenses against the United States of America: The distribution and possession with the intent to distribute marijuana, a Schedule I, narcotic controlled substance, in violation of Title 21, United States Code, Section 841(a)(1).

PURPOSE

The conspiracy consisted of the defendants DEAN JENKINS, GORDON SEXTON, JUAN SEPULVEDA, GILBERT SEPULVEDA, AGUSTIN GOMEZ; WILLIAM BARRETT, ADOLPHUS BOYD BUCKNER, JAMES CHANDLER, MELVIN DEADRICK, GEORGE GROVER JOHNSON, GARY KELLEY, SHERRY KELLEY, CHARLIE LEE WILLIAMS, JAMES EDWARD HOLT, aka

SPANKY HOLT, and other persons, and unindicted coconspirators known and unknown to the Grand Jury whose primary purpose was to expand and promote an illegal business activity deriving profits from the illegal distribution and possession with the intent to distribute marijuana.

METHODS AND MEANS

To accomplish the purpose of the conspiracy, the defendants, DEAN JENKINS, GORDON SEXTON, JUAN SEPULVEDA, GILBERT SEPULVEDA, AGUSTIN GOMEZ, WILLIAM BARRETT, ADOLPHUS BOYD BUCKNER, JAMES CHANDLER, MELVIN DEADRICK, GEORGE GROVER JOHNSON, GARY KELLEY, SHERRY KELLEY, CHARLIE LEE WILLIAMS, JAMES EDWARD HOLT, aka SPANKY HOLT, and other persons, and unindicted coconspirators known and unknown to the Grand Jury used the following methods and means, among others:

a. Acts involving the felonious distribution and possession with the intent to distribute marijuana within the Eastern District of Tennessee and elsewhere, in violation of Title 21, United States Code, Section 841(a)(1).

b. Acts of knowingly and intentionally traveling in interstate commerce with the intent to promote, manage, facilitate and carry on an illegal business activity, to wit: the conspiracy to possess with the intent to distribute and the distribution of marijuana in violation of Title 18, United States

Code, Section 1952(a).

c. Acts of knowingly and intentionally using a communication facility, to wit: a telephone, to commit, cause, and facilitate violations of Title 21, United States Code, Section 846, that is the conspiracy to distribute a quantity of a mixture or substance containing marijuana, a Schedule I, narcotic controlled substance in violation of Title 21, United States Code, Section 843(b).

d. It was further a part of the conspiracy that during the time period between approximately November, 1991 and continuing until approximately December 21, 1993, DEAN JENKINS, GORDON SEXTON, JUAN SEPULVEDA, GILBERT SEPULVEDA, AGUSTIN GOMEZ, WILLIAM BARRETT, ADOLPHUS BOYD BUCKNER, JAMES CHANDLER, MELVIN DEADRICK, GEORGE GROVER JOHNSON, GARY KELLEY, SHERRY KELLEY, CHARLIE LEE WILLIAMS, JAMES EDWARD HOLT, aka SPANKY HOLT, and others would travel by automobile and by Tractor-trailer from the Eastern District of Tennessee to various locations in the State of Texas to purchase quantities of marijuana for further transportation and distribution of the marijuana in the Eastern District of Tennessee.

e. It was further a part of the conspiracy that during the time period between approximately November, 1991 and continuing until approximately December 21, 1993, defendants ADOLPHUS BOYD BUCKNER, JAMES

EDWARD HOLT, aka SPANKY HOLT, and others would meet JUAN SEPULVEDA, GILBERT SEPULVEDA, AGUSTIN GOMEZ and others in various South Texas locations for the purpose of purchasing marijuana for further transportation to the Eastern District of Tennessee.

f. It was further a part of the conspiracy that defendants DEAN JENKINS, GORDON SEXTON, JUAN SEPULVEDA, GILBERT SEPULVEDA, and AGUSTIN GOMEZ, in concert with WILLIAM BARRETT, ADOLPHUS BOYD BUCKNER, JAMES CHANDLER, MELVIN DEADRICK, GEORGE GROVER JOHNSON, GARY KELLEY, SHERRY KELLEY, CHARLIE LEE WILLIAMS, JAMES EDWARD HOLT, aka SPANKY HOLT, and others would transport and cause the transportation of quantities of marijuana from locations in the State of Texas to the Eastern District of Tennessee and other places, for distribution purposes between approximately November, 1991 and continuing until approximately December 21, 1993.

g. It was further a part of the conspiracy that during the time period between approximately November, 1991 and continuing until approximately December 21, 1993, DEAN JENKINS, GORDON SEXTON, JUAN SEPULVEDA, GILBERT SEPULVEDA, AGUSTIN GOMEZ, and JAMES EDWARD HOLT, aka SPANKY HOLT, and others would deliver marijuana to WILLIAM BARRETT, ADOLPHUS BOYD BUCKNER, JAMES

CHANDLER, MELVIN DEADRICK, GEORGE GROVER JOHNSON, GARY KELLEY, SHERRY KELLEY, CHARLIE LEE WILLIAMS, and other persons, for further distribution and sale of marijuana in the Eastern District of Tennessee.

h. It was further a part of the conspiracy that DEAN JENKINS, GORDON SEXTON, JUAN SEPULVEDA, GILBERT SEPULVEDA, and AGUSTIN GOMEZ, at various times material to this indictment, would store quantities of marijuana and proceeds of drug transactions at various locations throughout the Eastern District of Tennessee to minimize the risk of loss of marijuana and the proceeds of drug transactions in the event law enforcement conducted searches and to further process the marijuana for distribution.

i. It was further a part of the conspiracy that the defendants, DEAN JENKINS, GORDON SEXTON, JUAN SEPULVEDA, GILBERT SEPULVEDA, and AGUSTIN GOMEZ, in concert with WILLIAM BARRETT, ADOLPHUS BOYD BUCKNER, JAMES CHANDLER, MELVIN DEADRICK, GEORGE GROVER JOHNSON, GARY KELLEY, SHERRY KELLEY, CHARLIE LEE WILLIAMS, JAMES EDWARD HOLT, aka SPANKY HOLT, and other persons, and unindicted coconspirators known and unknown to the Grand Jury would effectuate various meetings and telephone calls with each other and other persons for the purposes of arranging, obtaining, delivering,

distributing and selling marijuana; for the purposes of concealing the existence of the conspiracy; for the purposes of distributing and concealing the money generated by the unlawful distribution of marijuana and for the purposes of redistributing the marijuana and for the purposes of redistributing the marijuana within the Eastern District of Tennessee and elsewhere including but not limited to the overt acts contained in counts III through XXXI which are incorporated by reference herein as well as other acts performed within the Eastern District of Tennessee and elsewhere.

FORFEITURE

As a result of the defendant JUAN SEPULVEDA's unlawful conspiracy to possess with the intent to distribute a quantity of a mixture or a substance containing a detectable amount of marijuana, a schedule I, narcotic controlled substance, as set forth in the above-referenced paragraph and upon his conviction of the same, the defendant, JUAN SEPULVEDA, shall forfeit to the United States any property constituting proceeds obtained by the defendant, JUAN SEPULVEDA, as a result of the conspiracy to possess with the intent to distribute a quantity of a mixture or a substance containing a detectable amount of marijuana, a schedule I, narcotic controlled substance, that is $350,000.00 received by the defendant, JUAN SEPULVEDA.

If, as the result of any act or omission of the defendant

JUAN SEPULVEDA, the property described above, (1) cannot be located upon the exercise of due diligence; (2) has been transferred or sold to or deposited with a third party; (3) has been substantially diminished in value; or (4) has been commingled with other property which cannot be divided without difficulty, the defendant JUAN SEPULVEDA shall forfeit any other property of the defendant up to the value of the property described above.

FORFEITURE

As a result of the defendant DEAN JENKINS' unlawful conspiracy to possess with the intent to distribute a quantity of a mixture or a substance containing a detectable amount of marijuana, a schedule I, narcotic controlled substance, as set forth in the above-referenced paragraph and upon his conviction of the same, the defendant, DEAN JENKINS, shall forfeit to the United States any property used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of the conspiracy to possess with the intent to distribute a quantity of a mixture or a substance containing a detectable amount of marijuana, a schedule I, narcotic controlled substance, that is, one (1) 1985 Peter Bilt, Flat-Nose, Cab-Over tractor, being olive green in color with gold stripes beginning at the front and continuing down the sides, and bearing in white script lettering the words, "Black Mountain Motor Lines, Del Rio, Tennessee and one (1) 1985 Great Dane, refrigerated, Thermo-King trailer being silver in color.

If, as the result of any act or omission of the defendant DEAN JENKINS, the properties described above, (1) cannot be located upon the exercise of due diligence; (2) has been transferred or sold to or deposited with a third party; (3) has been substantially diminished in value; or (4) has been commingled with other property which cannot be divided without difficulty, the defendant DEAN JENKINS shall forfeit any other property of the defendant up to the value of the property described above.

[21 U.S.C. §§ 846, 841(b)(1)(A) and 853]

COUNT III

The Grand Jury further charges that on or about November 15, 1991, in the Eastern District of Tennessee and elsewhere, the defendant, GORDON SEXTON, aided and abetted by others, did knowingly and intentionally distribute a quantity of a mixture or a substance containing a detectable amount of marijuana, a Schedule I, narcotic controlled substance.

[21 U.S.C. §§ 841(a)(1), (b)(1)(D), 18 U.S.C. § 2]

COUNT IV

The Grand Jury further charges that on or about August 20, 1992, the defendant, ADOLPHUS BOYD BUCKNER and others, did travel and cause travel in interstate commerce from the Eastern District of Tennessee to the State of Texas, with the intent to promote, manage,

establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, that is, a business enterprise involved in the possession with the intent to distribute marijuana, a Schedule I, narcotic controlled substance, and thereafter did perform and attempt to perform acts designed to perform, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of unlawful business activity involving marijuana, a Schedule I, narcotic controlled substance.
[18 U.S.C. § 1952(a)]

COUNT V

The Grand Jury further charges that on or about April 8, 1993, in the Eastern District of Tennessee and elsewhere, the defendant, MELVIN DEADRICK, and others did knowingly and intentionally distribute a quantity of a mixture or a substance containing a detectable amount of marijuana, a Schedule I, narcotic controlled substance.
[21 U.S.C. §§ 841(a)(1), (b)(1)(D)]

COUNT VI

The Grand Jury further charges that on or about April 13, 1993, in the Eastern District of Tennessee, the defendant, GARY KELLEY, aided and abetted by SHERRY KELLEY and GEORGE GROVER JOHNSON, did knowingly and intentionally distribute a quantity of a mixture or a substance containing a detectable amount of marijuana, a Schedule I, narcotic controlled substance.

FORFEITURE

As a result of the defendant GARY KELLEY's unlawful distribution of a quantity of a mixture or a substance containing a detectable amount of marijuana, a schedule I, narcotic controlled substance, as set forth in the above-referenced paragraph and upon his conviction of the same, the defendant, GARY KELLEY, shall forfeit to the United States any property constituting proceeds obtained by the defendant, GARY KELLEY, as a result of the distribution of a quantity of a mixture or a substance containing a detectable amount of marijuana, a schedule I, narcotic controlled substance, that is $4,500.00 received by the defendant, GARY KELLEY.

If, as the result of any act or omission of the defendant GARY KELLEY, the property described above, (1) cannot be located upon the exercise of due diligence, (2) has been transferred or sold to or deposited with a third party; (3) has been substantially diminished in value; or (4) has been commingled with other property which cannot be divided without difficulty, the defendant GARY KELLEY shall forfeit any other property of the defendant up to the value of the property described above.

[21 U.S.C. §§ 841(a)(1), (b)(1)(D), 853 and 18 U.S.C. § 2]

COUNT VII

The Grand Jury further charges that on or about April 25, 1993, in the Eastern District of Tennessee, the defendant, GARY KELLEY, aided and abetted by SHERRY KELLEY,

did knowingly and intentionally distribute a quantity of a mixture or a substance containing a detectable amount of marijuana, a Schedule I, narcotic controlled substance.

FORFEITURE

As a result of the defendant GARY KELLEY's unlawful distribution of a quantity of a mixture or a substance containing a detectable amount of marijuana, a schedule I, narcotic controlled substance, as set forth in the above-referenced paragraph and upon his conviction of the same, the defendant, GARY KELLEY, shall forfeit to the United States any property constituting proceeds obtained by the defendant, GARY KELLEY, as a result of the distribution of a quantity of a mixture or a substance containing a detectable amount of marijuana, a schedule I, narcotic controlled substance, that is, $4,500.00 received by the defendant, GARY KELLEY.

If, as the result of any act or omission of the defendant GARY KELLEY, the property described above, (1) cannot be located upon the exercise of due diligence; (2) has been transferred or sold to or deposited with a third party; (3) has been substantially diminished in value; or (4) has been commingled with other property which cannot be divided without difficulty, the defendant GARY KELLEY shall forfeit any other property of the defendant up to the value of the property described above.

[21 U.S.C. §§ 841(a)(1), (b)(1)(D), 853 and 18 U.S.C. § 2]

COUNT VIII

The Grand Jury further charges that on or about April 25, 1993, in the Eastern District of Tennessee, the defendant, GARY KELLEY, aided and abetted by SHERRY KELLEY, did knowingly and intentionally use a communication facility, that is, a telephone, to facilitate a violation of 21 U.S.C. § 846, the conspiracy to possess with the intent to distribute marijuana.

[21 U.S.C. § 843(b) and 18 U.S.C. § 2]

COUNT IX

The Grand Jury further charges that on or about May 5, 1993, in the Eastern District of Tennessee, the defendant, GARY KELLEY, aided and abetted by SHERRY KELLEY, did knowingly and intentionally distribute a quantity of a mixture or a substance containing a detectable amount of marijuana, a Schedule I, narcotic controlled substance.

FORFEITURE

As a result of the defendant GARY KELLEY's unlawful distribution of a quantity of a mixture or a substance containing a detectable amount of marijuana, a schedule I, narcotic controlled substance, as set forth in the above-referenced paragraph and upon his conviction of the same, the defendant, GARY KELLEY, shall forfeit to the United States any property constituting proceeds obtained by the defendant, GARY KELLEY, as a result of the distribution of a quantity

of a mixture or a substance containing a detectable amount of marijuana, a schedule I, narcotic controlled substance, that is $2,600.00 received by the defendant, GARY KELLEY.

COUNT X

The Grand Jury further charges that on or about May 13, 1993, in the Eastern District of Tennessee, the defendant, WILLIAM BARRETT, did knowingly and intentionally distribute a quantity of a mixture or a substance containing a detectable amount of marijuana, a Schedule I, narcotic controlled substance.

FORFEITURE

As a result of the defendant WILLIAM BARRETT's unlawful distribution of a quantity of a mixture or a substance containing a detectable amount of marijuana, a schedule I, narcotic controlled substance, as set forth in the above-referenced paragraph and upon his conviction of the same, the defendant, WILLIAM BARRETT, shall forfeit to the United States any property constituting proceeds obtained by the defendant, WILLIAM BARRETT, as a result of the distribution of a quantity of a mixture or a substance containing a detectable amount of marijuana, a schedule I, narcotic controlled substance, that is, $3,900.00 received by the defendant, WILLIAM BARRETT.

If, as the result of any act or omission of the defendant WILLIAM BARRETT, the property described above, (1)

cannot be located upon the exercise of due diligence; (2) has been transferred or sold to or deposited with a third party; (3) has been substantially diminished in value; or (4) has been commingled with other property which cannot be divided without difficulty, the defendant WILLIAM BARRETT shall forfeit any other property of the defendant up to the value of the property described above.

[21 U.S.C. §§ 841(a)(1), (b)(1)(D) and 853]

COUNT XI

The Grand Jury further charges that on or about May 13, 1993, in the Eastern District of Tennessee, the defendant, WILLIAM BARRETT, did knowingly and intentionally use and carry a firearm, that is, a .45 caliber automatic pistol, during and in relation to a drug trafficking offense, that is a violation of Title 21, United States Code, Section 841(a)(1).

[18 U.S.C. § 924(c)(1)]

COUNT XII

The Grand Jury further charges that on or about May 20, 1993, in the Eastern District of Tennessee, the defendant, GEORGE GROVER JOHNSON, aided and abetted by ADOLPHUS BOYD BUCKNER, did knowingly and intentionally distribute a quantity of a mixture or a substance containing a detectable amount of marijuana, a Schedule I, narcotic controlled substance.

FORFEITURE

As a result of the defendant GEORGE GROVER JOHNSON's unlawful distribution of a quantity of a mixture or a substance containing a detectable amount of marijuana, a schedule I, narcotic controlled substance, as set forth in the above-referenced paragraph and upon his conviction of the same, the defendant, GEORGE GROVER JOHNSON, shall forfeit to the United States any property constituting proceeds obtained by the defendant, GEORGE GROVER JOHNSON, as a result of the distribution of a quantity of a mixture or a substance containing a detectable amount of marijuana, a schedule I, narcotic controlled substance, that is, $4,600.00 received by the defendant, GEORGE GROVER JOHNSON.

If, as the result of any act or omission of the defendant GEORGE GROVER JOHNSON, the property described above, (1) cannot be located upon the exercise of due diligence; (2) has been transferred or sold to or deposited with a third party; (3) has been substantially diminished in value; or (4) has been commingled with other property which cannot be divided without difficulty, the defendant GEORGE GROVER JOHNSON shall forfeit any other property of the defendant up to the value of the property described above.

[21 U.S.C. §§ 841(a)(1), (b)(1)(D), 853 and 18 U.S.C. § 2]

COUNT XIII

The Grand Jury further charges that on or about May 26, 1993, in the Eastern District of Tennessee, the defendant,

GEORGE GROVER JOHNSON, aided and abetted by GARY KELLEY and SHERRY KELLEY, did knowingly and intentionally distribute a quantity of a mixture or a substance containing a detectable amount of marijuana, a Schedule I, narcotic controlled substance.

FORFEITURE

As a result of the defendant GEORGE GROVER JOHNSON's unlawful distribution of a quantity of a mixture or a substance containing a detectable amount of marijuana, a schedule I, narcotic controlled substance, as set forth in the above-referenced paragraph and upon his conviction of the same, the defendant, GEORGE GROVER JOHNSON, shall forfeit to the United States any property constituting proceeds obtained by the defendant, GEORGE GROVER JOHNSON, as a result of the distribution of a quantity of a mixture or a substance containing a detectable amount of marijuana, a schedule I, narcotic controlled substance, that is, $4,500.00 received by the defendant, GEORGE GROVER JOHNSON.

If, as the result of any act or omission of the defendant GEORGE GROVER JOHNSON, the property described above, (1) cannot be located upon the exercise of due diligence; (2) has been transferred or sold to or deposited with a third party; (3) has been substantially diminished in value; or (4) has been commingled with other property which cannot be divided without difficulty, the defendant GEORGE GROVER JOHNSON shall forfeit any other property of the defendant up

to the value of the property described above.
[21 U.S.C. §§ 841(a)(1), (b)(1)(D), 853 and 18 U.S.C. § 2]

COUNT XIV

The Grand Jury further charges that on or about May 26, 1993, in the Eastern District of Tennessee, the defendant, GEORGE GROVER JOHNSON did knowingly and intentionally use a communication facility, that is, a telephone, to facilitate a violation of 21 U.S.C. § 846, the conspiracy to possess with the intent to distribute marijuana.
[21 U.S.C. § 843(b)]

COUNT XV

The Grand Jury further charges that on or about June 18, 1993, in the Eastern District of Tennessee, the defendant, GEORGE GROVER JOHNSON, did knowingly and intentionally distribute a quantity of a mixture or a substance containing a detectable amount of marijuana, a Schedule I, narcotic controlled substance.

FORFEITURE

As a result of the defendant GEORGE GROVER JOHNSON's unlawful distribution of a quantity of a mixture or a substance containing a detectable amount of marijuana, a schedule I, narcotic controlled substance, as set forth in the above-referenced paragraph and upon his conviction of the same, the defendant, GEORGE GROVER JOHNSON, shall

forfeit to the United States any property constituting proceeds obtained by the defendant, GEORGE GROVER JOHNSON, as a result of the distribution of a quantity of a mixture or a substance containing a detectable amount of marijuana, a schedule I, narcotic controlled substance, that is, $6,000.00 received by the defendant, GEORGE GROVER JOHNSON.

If, as the result of any act or omission of the defendant GEORGE GROVER JOHNSON, the property described above, (1) cannot be located upon the exercise of due diligence; (2) has been transferred or sold to or deposited with a third party; (3) has been substantially diminished in value; or (4) has been commingled with other property which cannot be divided without difficulty, the defendant GEORGE GROVER JOHNSON shall forfeit any other property of the defendant up to the value of the property described above.

[21 U.S.C. §§ 841(a)(1), (b)(1)(D) and 853]

COUNT XVI

The Grand Jury further charges that on or about July 15, 1993, in the Eastern District of Tennessee, the defendant, WILLIAM BARRETT, did knowingly and intentionally distribute a quantity of a mixture or a substance containing a detectable amount of marijuana, a Schedule I, narcotic controlled substance.

FORFEITURE

As a result of the defendant WILLIAM BARRETT's

unlawful distribution of a quantity of a mixture or a substance containing a detectable amount of marijuana, a schedule I, narcotic controlled substance, as set forth in the above-referenced paragraph and upon his conviction of the same, the defendant, WILLIAM BARRETT, shall forfeit to the United States any property constituting proceeds obtained by the defendant, WILLIAM BARRETT, as a result of the distribution of a quantity of a mixture or a substance containing a detectable amount of marijuana, a schedule I, narcotic controlled substance, that is, $5,200.00 received by the defendant, WILLIAM BARRETT.

If, as the result of any act or omission of the defendant WILLIAM BARRETT, the property described above, (1) cannot be located upon the exercise of due diligence; (2) has been transferred or sold to or deposited with a third party; (3) has been substantially diminished in value; or (4) has been commingled with other property which cannot be divided without difficulty, the defendant WILLIAM BARRETT shall forfeit any other property of the defendant up to the value of the property described above.

[21 U.S.C. §§ 841(a)(1), (b)(1)(D) and 853]

COUNT XVII

The Grand Jury further charges that on or about August 12, 1993, in the Eastern District of Tennessee, the defendant, JAMES CHANDLER, aided and abetted by MELVIN DEADRICK, did knowingly and intentionally

distribute a quantity of a mixture or a substance containing a detectable amount of marijuana, a Schedule I, narcotic controlled substance.

FORFEITURE

As a result of the defendant JAMES CHANDLER's unlawful distribution of a quantity of a mixture or a substance containing a detectable amount of marijuana, a schedule I, narcotic controlled substance, as set forth in the above-referenced paragraph and upon his conviction of the same, the defendant, JAMES CHANDLER, shall forfeit to the United States any property constituting proceeds obtained by the defendant, JAMES CHANDLER, as a result of the distribution of a quantity of a mixture or a substance containing a detectable amount of marijuana, a schedule I, narcotic controlled substance, that is, $5,300.00 received by the defendant, JAMES CHANDLER.

If, as the result of any act or omission of the defendant JAMES CHANDLER, the property described above, (1) cannot be located upon the exercise of due diligence; (2) has been transferred or sold to or deposited with a third party; (3) has been substantially diminished in value; or (4) has been commingled with other property which cannot be divided without difficulty, the defendant JAMES CHANDLER shall forfeit any other property of the defendant up to the value of the property described above.

[21 U.S.C. §§ 841(a)(1), (b)(1)(D), 853 and 18 U.S.C. § 2]

COUNT XVIII

The Grand Jury further charges that on or about August 12, 1993, in the Eastern District of Tennessee, the defendant, James Chandler did knowingly and intentionally use and carry a firearm, that is, a .41 Magnum Western Style six-shot, blue revolver with six inch barrel, during and in relation to a drug trafficking offense, that is, a violation of Title 21, United States Code, Section 841(a)(1).

[18 U.S.C. § 924(c)(1)]

COUNT XIX

The Grand Jury further charges that on or about September 1, 1993, in the Eastern District of Tennessee, the defendant, JAMES CHANDLER, did knowingly and intentionally distribute a quantity of a mixture or a substance containing a detectable amount of marijuana, a Schedule I, narcotic controlled substance.

FORFEITURE

As a result of the defendant JAMES CHANDLER's unlawful distribution of a quantity of a mixture or a substance containing a detectable amount of marijuana, a schedule I, narcotic controlled substance, as set forth in the above-referenced paragraph and upon his conviction of the same, the defendant, JAMES CHANDLER, shall forfeit to the United States any property constituting proceeds obtained by the defendant, JAMES CHANDLER, as a result of the

distribution of a quantity of a mixture or a substance containing a detectable amount of marijuana, a schedule I, narcotic controlled substance, that is, $5,300.00 received by the defendant, JAMES CHANDLER.

If, as the result of any act or omission of the defendant JAMES CHANDLER, the property described above, (1) cannot be located upon the exercise of due diligence; (2) has been transferred or sold to or deposited with a third party; (3) has been substantially diminished in value; or (4) has been commingled with other property which cannot be divided without difficulty, the defendant JAMES CHANDLER shall forfeit any other property of the defendant up to the value of the property described above.

[21 U.S.C. §§ 841(a)(1), (b)(1)(D) and 853]

COUNT XX

The Grand Jury further charges that on or about September 2, 1993, in the Eastern District of Tennessee, the defendant, WILLIAM BARRETT, did knowingly and intentionally distribute a quantity of a mixture or a substance containing a detectable amount of marijuana, a Schedule I, narcotic controlled substance.

FORFEITURE

As a result of the defendant WILLIAM BARRETT's unlawful distribution of a quantity of a mixture or a substance containing a detectable amount of marijuana, a schedule I,

narcotic controlled substance, as set forth in the above-referenced paragraph and upon his conviction of the same, the defendant, WILLIAM BARRETT, shall forfeit to the United States any property constituting proceeds obtained by the defendant, WILLIAM BARRETT, as a result of the distribution of a quantity of a mixture or a substance containing a detectable amount of marijuana, a schedule I, narcotic controlled substance, that is, $4,200.00 received by the defendant, WILLIAM BARRETT.

If, as the result of any act or omission of the defendant WILLIAM BARRETT, the property described above, (1) cannot be located upon the exercise of due diligence; (2) has been transferred or sold to or deposited with a third party; (3) has been substantially diminished in value; or (4) has been commingled with other property which cannot be divided without difficulty, the defendant WILLIAM BARRETT shall forfeit any other property of the defendant up to the value of the property described above.

[21 U.S.C. §§ 841(a)(1), (b)(1)(D) and 853)]

COUNT XXI

The Grand Jury further charges that on or about September 2, 1993, in the Eastern District of Tennessee and elsewhere, the defendant, JUAN SEPULVEDA, did knowingly and intentionally distribute a quantity of a mixture or a substance containing a detectable amount of marijuana, a Schedule I, narcotic controlled substance.

[21 U.S.C. §§ 841(a)(1), (b)(1)(D)]

COUNT XXII

The Grand Jury further charges that on or about September 9, 1993, in the Eastern District of Tennessee, the defendant, GORDON SEXTON, aided and abetted by CHARLIE LEE WILLIAMS, did knowingly and intentionally distribute a quantity of a mixture or a substance containing a detectable amount of marijuana, a Schedule I, narcotic controlled substance.

FORFEITURE

As a result of the defendant GORDON SEXTON's unlawful distribution of a quantity of a mixture or a substance containing a detectable amount of marijuana, a schedule I, narcotic controlled substance, as set forth in the above-referenced paragraph and upon his conviction of the same, the defendant, GORDON SEXTON, shall forfeit to the United States any property constituting proceeds obtained by the defendant GORDON SEXTON, as a result of the distribution of a quantity of a mixture or a substance containing a detectable amount of marijuana, a schedule I, narcotic controlled substance, that is, $9,100.00 received by the defendant, GORDON SEXTON.

If, as the result of any act or omission of the defendant GORDON SEXTON, the property described above, (1) cannot be located upon the exercise of due diligence; (2) has

been transferred or sold to or deposited with a third party; (3) has been substantially diminished in value; or (4) has been commingled with other property which cannot be divided without difficulty, the defendant GORDON SEXTON shall forfeit any other property of the defendant up to the value of the property described above.

[21 U.S.C. §§ 841(a)(1), (b)(1)(D), 853 and 18 U.S.C. § 2]

COUNT XXIII

The Grand Jury further charges that on or about September 9, 1993, in the Eastern District of Tennessee, the defendant, CHARLIE LEE WILLIAMS, did knowingly and intentionally use and carry a firearm, that is, a .45 caliber automatic pistol and a .38 caliber revolver, during and in relation to a drug trafficking offense, that is, a violation of Title 21, United States Code, Section 841(a)(1).

[18 U.S.C. § 924 (c)(1)]

COUNT XXIV

The Grand Jury further charges that on or about September 9, 1993, in the Eastern District of Tennessee, the defendant, CHARLIE LEE WILLIAMS, did knowingly and intentionally use a communication facility, that is, a telephone, to facilitate a violation of 21 U.S.C. § 846, the conspiracy to possess with the intent to distribute marijuana.

[21 U.S.C. § 843(b)]

COUNT XXV

The Grand Jury further charges that on or about September 21, 1993, in the Eastern District of Tennessee, the defendant, GORDON SEXTON, aided and abetted by CHARLIE LEE WILLIAMS, did knowingly and intentionally distribute a quantity of a mixture or a substance containing a detectable amount of marijuana, a Schedule I, narcotic controlled substance.

FORFEITURE

As a result of the defendant GORDON SEXTON's unlawful distribution of a quantity of a mixture or a substance containing a detectable amount of marijuana, a schedule I, narcotic controlled substance, as set forth in the above-referenced paragraph and upon his conviction of the same, the defendant, GORDON SEXTON, shall forfeit to the United States any property constituting proceeds obtained by the defendant, GORDON SEXTON, as a result of the distribution of a quantity of a mixture or a substance containing a detectable amount of marijuana, a schedule I, narcotic controlled substance, that is, $7,200.00 received by the defendant, GORDON SEXTON.

If, as the result of any act or omission of the defendant GORDON SEXTON, the property described above, (1) cannot be located upon the exercise of due diligence; (2) has been transferred or sold to or deposited with a third party; (3) has been substantially diminished in value; or (4) has been

commingled with other property which cannot be divided without difficulty, the defendant GORDON SEXTON shall forfeit any other property of the defendant up to the value of the property described above.

[21 U.S.C. §§ 841 (a)(1), (b)(1)(D), 853 and 18 U.S.C. § 2]

COUNT XXVI

The Grand Jury further charges that on or about September 21, 1993, in the Eastern District of Tennessee, the defendant, CHARLIE LEE WILLIAMS, did knowingly and intentionally use and carry a firearm, that is, a .45 caliber automatic pistol and a .38 caliber revolver, during and in relation to a drug trafficking offense, that is, a violation of Title 21, United States Code, Section 841(a)(a)

[18 U.S.C. § 924(c)(1)]

COUNT XXVII

The Grand Jury further charges that on or about September 21, 1993, in the Eastern District of Tennessee, the defendant, GORDON SEXTON, did knowingly and intentionally use and carry a firearm, that is, a .38 caliber, snub-nose, five shot, revolver, during and in relation to a drug trafficking offense, that is, a violation of Title 21, United States Code, Section 841(a)(1).

[18 U.S.C. § 924(c)(1)]

COUNT XXVIII

The Grand Jury further charges that on or about November 15, 1993, the defendant, DEAN JENKINS, GORDON SEXTON, JUAN SEPULVEDA, GILBERT SEPULVEDA, and AGUSTIN GOMEZ and others, did travel and cause travel in interstate commerce from the Eastern District of Tennessee to the State of Texas, with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, that is, a business enterprise involved in the possession with the intent to distribute marijuana, a Schedule I, narcotic controlled substance, and thereafter did perform and attempt to perform acts designed to perform, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of unlawful business activity involving marijuana, a Schedule I, narcotic controlled substance.

[18 U.S.C. § 1952(a)]

COUNT XIX

The Grand Jury further charges that on or about November 16, 1993, the defendant, JAMES EDWARD HOLT, aka SPANKY HOLT, did knowingly and intentionally possess with the intent to distribute a quantity of a mixture or a substance containing a detectable amount of marijuana, a Schedule I, narcotic controlled substance.

[21 U.S.C. §§ 841(a)(1), (b)(1)(B)]

COUNT XXX

The Grand Jury further charges that on or about December 21, 1993, in the Eastern District of Tennessee, the defendants, GARY KELLEY, aided and abetted by SHERRY KELLEY, did knowingly and intentionally distribute a quantity of a mixture or a substance containing a detectable amount of marijuana, a Schedule I, narcotic controlled substance.

[21 U.S.C. §§ 841(a)(1), (b)(1)(D) and 18 U.S.C. § 2]

COUNT XXXI

The Grand Jury further charges that on or about December 21, 1993, in the Eastern District of Tennessee, the defendant, GARY KELLEY, did knowingly and intentionally use a carry a firearm, that is, a Smith & Wesson .22 caliber automatic pistol, serial number TBF6071, during and in relation to a drug trafficking offense, that is, a violation of Title 21, United States Code, Section 841(a)(1).

[18 U.S.C. § 924(c)(1)]

True Bill:

/s/ Carolyn Alexander
Foreperson

/s/ D. R. Smith for Carl K. Kirkpatrick
Carl K. Kirkpatrick
United States Attorney

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

TRANSCRIPTS

In Re: Motions to Suppress 66

In Re: Motion to Suppress
April 11, 1994

***** Transcript beginning at Page 33 *****

CROSS EXAMINATION

BY MR. HURST:

Q. OFFICER LOPEZ, YOU WERE ON PATROL OUT THERE THAT NIGHT OF NOVEMBER THE 16TH, IS THAT CORRECT?

A. YES, I WAS.

Q. IS THAT JUST A ROUTINE WORKDAY FOR YOU?

A. YES.

Q. PRIOR TO STOPPING MR. HOLT'S TRUCK, HAD YOU BEEN INVOLVED IN ANY SURVEILLANCE UPON THIS TRUCK?

A. NO, I DID NOT.

Q. DID YOU KNOW ANYONE HAD BEEN SURVEILLING THIS TRUCK?

A. YES, I DID.

Q. ALL RIGHT. WAS THAT BECAUSE MR. ESCALON HAD TOLD YOU THAT?

A. YES.

Q. AND I TAKE IT HE MADE CONTACT WITH YOU WHILE YOU WERE IN YOUR PATROL CAR THAT

NIGHT?

A. YES, HE DID.

Q. AND HE TOLD YOU, I BELIEVE, YOU STATED TO THE COURT THAT YOU SHOULD STOP THE TRUCK, MAKE A TRAFFIC STOP?

A. YES, HE DID.

Q. ALL RIGHT, AND BASED ON WHAT HE TOLD YOU, YOU PICKED UP THE TRUCK AND DID STOP THE TRUCK?

A. YES, I DID.

Q. FLASHED YOUR LIGHTS, FLASHED YOUR LIGHTS AND MR. HOLD PULLED OVER --

A. YES, HE DID.

Q. -- ON THE HIGHWAY THERE? WHEN MR. HOLT GOT OUT, DID YOU NOT TELL HIM YOU WERE STOPPING HIM BECAUSE HE HAD A LIGHT BURNED OUT?

A. I MAY HAVE. I DON'T RECALL, SIR.

Q. ALL RIGHT, AND DID YOU EVER WRITE MR. HOLT A TICKET FOR A LIGHT?

A. I DON'T RECALL.

Q. DID YOU EVER GIVE HIM ANY TICKET WHATSOEVER?

A. I DON'T RECALL IF I DID OR NOT.

Q. YOU HAVE NO RECORD OF GIVING HIM A TICKET, I TAKE IT?

A. I DON'T RECALL.

Q. WERE YOU THE LEAD OFFICER, WERE YOU IN CHARGE OF THAT STOP OF MR. HOLT'S TRUCK?

A. THE TRAFFIC STOP ITSELF?

Q. YES.

A. YES.

*** Transcript continuing at Page 37 ***

Q. AND WERE YOU STOPPED THERE ON THE HIGHWAY?

A. YES, I WAS.

Q. WHO STOPPED YOU?

A. OFFICER LOPEZ.

Q. AND WHAT DID OFFICER LOPEZ TELL YOU WHEN HE STOPPED YOU?

A. HE TOLD ME HE WAS STOPPING ME BECAUSE I HAD A TAG LIGHT OUT.

Q. DID HE GIVE YOU A TICKET FOR THE TAG LIGHT?

A. NO, HE DIDN'T.

THE COURT: DID NOT?

THE WITNESS: NO, SIR.

Q. DID HE ASK YOU TO SEARCH YOUR TRUCK?

A. YES, HE DID.

Q. WHAT DID YOU TELL HIM?

A. I TOLD HIM I DIDN'T OWN WHAT WAS ON THE TRUCK.

Q. DID YOU SIGN A CONSENT TO SEARCH THE TRUCK?

A. I SIGNED THE FORM, BUT WHAT I THOUGHT I WAS SIGNING WAS GETTING A TICKET FOR A TAG LIGHT OUT. IT WAS DARK AND I DIDN'T PAY ANY

ATTENTION.

Q. MR. HURST: YOUR HONOR, MIGHT HE BE PRESENTED THE CONSENT TO SEARCH?

THE COURT: YEAH.

Q. DID YOU LOOK AT THAT -- FIRST OF ALL, IS THAT YOUR SIGNATURE ON IT?

A. YES, IT LOOKS LIKE IT.

Q. ALL RIGHT. DID YOU READ OVER THAT PIECE OF PAPER BEFORE YOU SIGNED IT?

A. NO, I DIDN'T.

Q. DID OFFICER LOPEZ EXPLAIN TO YOU WHAT YOU WERE SIGNING THERE?

A. NOT THAT I RECALL.

Q. DID ANYONE ELSE?

A. NO.

Q. AND DID YOU TELL OFFICER LOPEZ HE COULD SEARCH THE TRUCK?

A. I TOLD HIM THAT WASN'T UP TO ME; THAT I DIDN'T OWN THE STUFF.

MR. HURST: THAT'S ALL I HAVE, YOUR HONOR.

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

REPORT AND RECOMENDATION

Report and Recommendation of Magistrate Judge 71

Defendants Jenkins and Holts' Objections to Report and Recommendations 77

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
GREENEVILLE

UNITED STATES
OF AMERICA

vs. NO. CR-2-93-62

DEAN JENKINS,
ET AL

REPORT AND RECOMMENDATION

This matter is before the undersigned, pursuant to the standing orders of the court, for a report and recommendation with respect to the Motion to Suppress Evidence of defendant Dean Jenkins [Doc. 228]; the government's Response [Doc. 238]; the Motion to Suppress Evidence of defendant James Edward Holt [Doc. 236]; and the government's Response [Doc. 250]. Oral argument and an evidentiary hearing were held before the undersigned on April 11, 1994.

Defendant Jenkins is the owner of a trucking concern known as Black Mountain Motor Lines ("Black Mountain"). Defendant Holt was employed by Jenkins and Black Mountain as a truck driver. On November 16, 1993, a tractor-trailer owned by Jenkins and/or Black Mountain and operated by Holt came to be stopped outside Edinburg, Texas under the

following circumstances:

Special Agent R. M. Gilleland of the Tennessee Bureau of Investigation ("TBI") went undercover in April of 1993 as a purchaser of marijuana in Cocke County, Tennessee after being advised by a cooperative witness that a marijuana distribution ring was importing marijuana from Texas. Defendant Holt was identified by the informant as being a driver who would take one of defendant Jenkins' Black Mountain trucks and go to Texas to pick up marijuana. After infiltrating the ring, Gilleland was advised that defendant Juan Sepulvada supplied the marijuana from Edinburg, Texas and that it was shipped to East Tennessee in Black Mountain trucks driven by defendant Holt for distribution. When a shipment of marijuana would arrive in Tennessee, defendant Juan Sepulvada would come to Tennessee and receive payment for the shipment.

In November of 1993, Agent Gilleland took a false bottomed pick-up truck to Edinburg, Texas to purchase 200 pounds of marijuana from Juan Sepulvada. Once there, Sepulvada advised Gilleland that his truck was insufficient for transporting the cargo and that Gilleland's marijuana would be shipped to Tennessee in a Black Mountain truck driven by Holt which was in Texas at that time. Agent Gilleland contacted the Texas authorities and met with Agent Frank Escalon of the Texas Department of Safety on November 12th. Gilleland advised Escalon of the fact that marijuana was being supplied by Juan Sepulvada and transported from

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Edinburg to East Tennessee in Black Mountain trucks, and that a Black Mountain truck was at that time in the area to pick up a shipment. A search of the Edinburg area soon located the Black Mountain vehicle on November 14th. The truck was kept under constant surveillance until its eventual stop by authorities on November 16th.

Agent Escalon first saw the Black Mountain truck in La Blanca, Texas. He followed it to where it picked up a load of carrots. When the vehicle began to leave the area on its return trip to Tennessee, Agent Escalon, based upon the information provided by Agent Gilleland, advised Trooper Lopez of the Texas Highway Patrol to stop the truck. The stop was made at 10:52 p.m. on November 16th. Trooper Lopez may have told defendant Holt who was driving the Black Mountain truck that he was being stopped for a broken tail light. Trooper Lopez was backed up by his partner Trooper Joe Ortiz and Barr County, Texas deputies. Trooper Lopez asked if he could search the vehicle. Holt agreed by signing a consent to search form. A search of the vehicle revealed 49 bundles containing 319.3 pounds of marijuana.

The undersigned finds that the foregoing are the factual details surrounding the stop and search. The undersigned does not find defendant Holt's statement that he thought he was signing a ticket when he executed the consent to search to be credible.

The motion of defendant Jenkins is challenged by the government which asserts that he lacks standing to contest the

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validity of the search. At the time of the search, defendant Jenkins was over 1000 miles from Edinburg, Texas. In the recent case of United States v. Blanco, 844 F.2d 344, 349 (6th Cir. 1988), the Sixth Circuit held that the lessee of a rental automobile who delivered possession of the car to another lacked standing to suppress evidence discovered during a search of the vehicle while it was in the possession of the other person. As against the rest of the world, save the actual owner, the lessee stood in the shoes of the owner while in possession of the vehicle. If one entitled to lawful possession of a motor vehicle, be he lessee or owner, willfully entrusts possession of the vehicle to another, and entrusts that person with the indicia of control, such as the keys, then Blanco suggests that the lessee or owner has no reasonable expectation of privacy in the vehicle or its contents. Mr. Holt could have let anyone look in the vehicle if he had wanted to. While his employer could have fired him for violating company rules, possession and exclusive control of the vehicle unquestionably belonged to Mr. Holt, not Mr. Jenkins. Accordingly, the undersigned is of the opinion that Mr. Jenkins lacks standing to attack the search. Accordingly, it is the recommendation of the undersigned that defendant Jenkins' motion [Doc. 228] be DENIED.

The thrust of defendant Holt's motion is that the search of the vehicle was conducted without a warrant and without probably cause; that the stop for a tail light violation was pretextual; that the search was not consented to and that even

if it was, the consent was invalid because of the pre- textual nature of the stop. As previously indicated, the under- signed has found from the evidence presented at the hearing that defendant Holt knowingly executed the consent form.

Based upon what Agent Gilleland knew from his intensive undercover investigation and what he had been told by Juan Sepulvada, by the time the vehicle departed the Edinburg area on its way to Tennessee, probable cause for the search almost certainly existed. Assuming arguendo that it did not, this case is virtually indistinguishable from United States v. Garza, 10 F.3d 1241 (6th Cir. 1993), in which an investigatory stop conducted under almost identical circumstances was approved by the Sixth Circuit under Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968), and United States v. Hardnett, 804 F.2d 353 (6th Cir. 1986). Garza stated that "[a] lawful Terry stop requires that the authorities be able to point to 'specific and articulable facts' justifying their reasonable suspicion that the suspect has been or is about to be involved in criminal activity." Id. at 1245. (citations omitted). Gilleland knew from the supplier that the Black Mountain truck, when it finally left for Tennessee, was going to be carrying the marijuana he was purchasing from Sepulvada. They kept the identified vehicle under constant surveillance for two days. When it finally left for Tennessee, the officers could certainly have reasonable suspicion that the marijuana was on board, which it in fact was. In the opinion of the undersigned, even if there was not probably cause, there

certainly were specific and articulable facts known to the officers which justified the stop under Terry, and Garza, supra. That being the case, the consent was not invalid. Accordingly, it is the recommendation of the undersigned that the Motion to Suppress [Doc. 236] of defendant Holt also be DENIED.[1]

/s/ Joe A. Tilson
JOE A. TILSON
UNITED STATES MAGISTRATE JUDGE

Filed: May 19, 1994

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[1]Any objections to this Report and Recommendation must be filed within ten (10) days of its service or further appeal will be waived. Thomas v. Arn, 474 U.S. 140 (1985); United States v. Walters, 638 F.2d 947-950 (6th Cir. 1981); 28 U.S.C. Section 636(b)(1)(B) and (C).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT GREENEVILLE

UNITED STATES
OF AMERICA

vs. DOCKET NO. CR-2-93-62

DEAN JENKINS

DEFENDANTS JENKINS AND HOLTS' OBJECTIONS TO REPORT AND RECOMMENDATION

Comes the Defendants, Dean Jenkins and James Edward Holt, pursuant to Rule 58(g)(2) of the Federal Rules of Criminal Procedure and file their objections to the Report and Recommendation filed by the Honorable Joe A. Tilson, United States Magistrate Judge, on May 19, 1994 recommending the denial of the Defendant's Motion to Suppress Evidence. In support of said objections, defendants would show unto the Court as follows:

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

An evidentiary hearing was held before the Magistrate Judge on April 11, 1994 and the Judge found that defendant

Jenkins was the owner of a trucking company known as Black Mountain Motor Lines and that defendant Holt was the driver of a tractor trailer owned by Black Mountain which was stopped outside Edingburg Texas on November 16, 1993.

The circumstances culminating in the stop of the tractor and trailer were found to be as follows by the Magistrate Judge:

"Special Agent R. M. Gilleland of the Tennessee Bureau of Investigation ("TBI") went under cover in April of 1993 as a purchaser of marijuana in Cocke County, Tennessee after being advised by a cooperative witness that a marijuana distribution ring was importing marijuana from Texas. Defendant Holt was identified by the informant as being a driver who would take one of defendant Jenkins' Black Mountain trucks and go to Texas to pick up marijuana. After infiltrating the ring, Gilleland was advised that defendant Juan Sepulveda supplied the marijuana from Edingburg, Texas and that it was shipped to East Tennessee in Black Mountain trucks driven by defendant Holt for distribution. When a shipment of marijuana would arrive in Tennessee, defendant Juan Sepulveda would come to Tennessee and receive payment for the shipment.

In November of 1993, Agent Gilleland took a false bottomed pick-up truck to Edingburg, Texas to purchase 200 pounds of marijuana from Juan Sepulveda. Once there, Sepulveda advised Gilleland that his truck was insufficient for transporting the cargo and that Gilleland's marijuana would be

shipped to Tennessee in a Black Mountain truck driven by Holt which was in Texas at that time. Agent Gilleland contacted the Texas authorities and met with Agent Frank Escalon of the Texas Department of Safety on Novembr 12th. Gilleland advised Escalon of the fact that marijuana was being supplied by Juan Sepulveda and transported from Edingburg to East Tennessee in Black Mountain trucks, and that a Black Mountain truck was at that time in the area to pick up a shipment. A search of the Edingburg area soon located the black Mountain vehicle on November 14th. The truck was kept under constant surveillance until its eventual stop by authorities on November 16th.

Agent Escalon first saw the Black Mountain truck in La Blanca, Texas. He followed it to where it picked up a load of carrots. When the vehicle began to leave the area on its return trip to Tennessee, Agent Escalon, based upon information provided by agent Gilleland, advised Trooper Lopez of the Texas Highway Patrol to stop the truck. The stop was made at 10:52 on November 16th. Trooper Lopez may have told defendant Holt who was driving the Black Mountain Truck that he was being stopped for a broken tail light. Trooper Lopez was backed up by his partner Trooper Joe Ortiz and Barr County, Texas deputies. Trooper Lopez asked if he could search the vehicle. Holt agreed by signing a consent to search form. A search of the vehicle revealed 49 bundles containing 319.3 pounds of marijuana.

The undersigned finds that the foregoing are the

factual details surrounding the stop and search. The undersigned does not find defendant Holt's statement that he thought he was signing a ticket when he executed the consent to search to be credible.

The motion of the defendant Jenkins is challenged by the government which asserts that he lacks standing to contest the validity of the search. At the time of the search, defendant Jenkins was over 1000 miles from Edingburg, Texas. In the recent case of United States v. Blanco, 844 F.2d 344, 349 (6th Cir. 1988), the Sixth Circuit held that the lessee of a rental automobile who delivered possession of the car to another lacked standing to suppress evidence discovered during a search of the vehicle while it was in possession of the other person. As against the rest of the world, save the actual owner, the lessee stood in the shoes of the owner while in possession of the vehicle. If one entitled to lawful possession of a motor vehicle, be he lessee or owner, willfully entrusts possession of the vehicle to another, and entrusts that person with indicia of control, such as the keys, then Blanco suggests that the lessee or owner has no reasonable expectation of privacy in the vehicle or it's contents. Mr. Holt could have let anyone look in the vehicle if he had wanted to. While is employer could have fired him for violating company rules, possession and exclusive control of the vehicle unquestionably belonged to Mr. Holt, not Mr. Jenkins. Accordingly, the undersigned is of the opinion that Mr. Jenkins lacks standing to attack the search. Accordingly, it is the recommendation of

the undersigned that defendant Jenkins' motion [Doc. 228] be DENIED.

The thrust of defendant Holt's motion is that the search of the vehicle was conducted without a warrant and without probable cause; that the stop for a tail light violation was pretextual; that the search was not consented to and even if it was, the consent was invalid because of the pretextual nature of the stop. As previously indicated, the undersigned has found from the evidence presented at the hearing that defendant Holt knowingly executed the consent form.

Based upon what Agent Gilleland knew from his intensive undercover investigation and what he had been told by Juan Sepulveda, by the time the vehicle departed the Edingburg area on its way to Tennessee, probable cause for the search almost certainly existed. Assuming arguendo that it did not, this case is virtually indistinguishable from United States v. Garza, 10 F.3d 1241 (6th Cir. 1993), in which an investigatory stop conducted under almost identical circumstances was approved by the Sixth Circuit under Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868 (1968), and United States v. Hardnett, 804 F.2d 353 (6th Cir. 1986). Garza stated that a lawful Terry stop requires that the authorities be able to point to 'specific and articulable facts' justifying their reasonable suspicion that the suspect has been or about to be involved in criminal activity.' Id. At 1245. (Citations omitted). Gilleland knew from the supplier that the Black Mountain truck, when it finally left for Tennessee, was gong

to be carrying the marijuana he was purchasing from Sepulveda. They kept the identified vehicle under constant surveillance for two days. When it finally left for Tennessee, the officers could certainly have reasonable suspicion that marijuana was on board, which it in fact was. In the opinion of the undersigned, even if there was not probable cause, there certainly were specific and articulable facts known to the officers which justified the stop under Terry, and Garza, supra. That being the case, the consent was not invalid. Accordingly, it is the recommendation of the undersigned that the Motion to Suppress [Doc. 236] of defendant Holt also be DENIED."

OBJECTIONS

1. Defendant Jenkins contends that the Judge below erred in finding that he did not have standing to contest the search and seizure of contraband from Defendant's tractor and trailer on November 16, 1993 and in denying defendant Holts' Motion to suppress based of the report and recommendation filed in this cause.

2. Defendant Holt submits that the Court below erred in failng to find that the stop was pretextual; made without probable cause; and made without a warrant. Defendant Holt further contends that the findings and recommendations are erroneous in failing to find that the consent was invalid and that the stop was justified as a Terry stop rather than a pretext stop.

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S OBJECTIONS

Defendant Jenkins submits that the issue of standing in cases involving an arrest by state officers is to be determined by state law so long as that law does not violate the 4th Amendment to the United States Constitution. See: Milton v. State, 549 S.W.2d 190, 192 (Tex. Cr. App. 1977) where the Court held that it was state law rather than federal law that governs the legality of a state arrest so long as the state law does not violate federal constitutional protections against unreasonable search and seizures.

Defendant Jenkins submits that the owner of a vehicle has standing to contest the search of the vehicle even though the owner is not present when the search is conducted and that the Magistrate Judge erred in recommending that his motion be denied because of his lack of standing. See: Soto v. State, 782 S.W.2d 17 (Tex. App. 1989), Review Refused and Crawford v. State, 772 S.W.2d 493 where the Texas Courts have held that the owner of a vehicle has standing to contest the search and seizure of his vehicle.

Defendant's Jenkins and Holt submit that the stop was a pretextual stop because Agent Escalon radioed Trooper Lopez and told him to stop defendant Holt for a traffic violation and obtain Holts' consent to search the tractor and trailer belonging to Black Mountain. See: United States v. Jones, 454 U.S. 594, 69 L.Ed.2d 262, 101 S. Ct. 2534.

Defendants' Jenkins and Holt contend that any consent given by Holt was involuntary because the stop was merely a pretext to obtain consent rather than a Terry stop as indicated by the Magistrate Judge. See: United States v. Gonzales, 763 F.2d 1127 (CA 10 NM).

Defendants contend that the stop went beyond the bounds of a permissible Terry stop and amounted to an arrest of defendant Holt. It is important to note that the record reflects the sole purpose for Trooper Lopez making the stop was to obtain defendant Holts' consent to search and there were several other state and county officers involved. In fact the officers never conducted any type of investigation of Holt but merely requested his consent to search after the pretext stop.

In addition, neither Agent Gilleland nor any other officer testified as to seeing any marijuana loaded on the tractor trailer before its departure to Tennessee which would justify a warrantless arrest of defendant. If probable cause existed, the officers had ample time to obtain a search warrant because Agent Gilleland testified that he had identified the vehicle the marijuana would be transported in approximately 2 days prior to the stop of the vehicle defendant Holt was driving. The law of the State of Texas is that a peace office should always obtain a warrant before making an arrest and defendants' submit that the same standard applies to search warrants. See: Honeycutt v. State, 499 S.W.2d 662 (Tex. Cr. App. 1973). Defendant's submit that a search warrant would

not be needed in the information concerning the vehicle to be used to transport the marijuana had been obtained a short time before the stop of vehicle defendant was driving. See: Moore v. State, 462 S.W. 638 (Tex. Ca.) And Carranco v. State, 419 S.W. 380 (Tex. Cr. App., 1967). The record clearly establishes that if probable cause existed, it existed for a period of approximately a period of at least 2 days after the vehicle defendant Holt was driving had been identified by law enforcement. Defendants Jenkins and Holt submit that the stop was illegal under the laws of the State of Texas and that said illegally obtained evidence can not be used against them in this court. See: Elkins v. United States, 364 U.S. 206, 80 S. Ct. 1684, 4 L.Ed.2d 1669 (1960) and Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L.Ed.2d 1081 (1961).

WHEREFORE, Defendants pray that the evidence seized from the search of the tractor and trailer on November 16, 1993 be suppressed and not allowed to be used against them for any purpose.

Respectfully submitted,
Dean Jenkins and
James Edward Holt

By: /s/ David B. Hill

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By: /s/ Terry E. Hurst by DBH
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CERTIFICATE OF SERVICE

I certify that I have mailed a true and exact copy of the foregoing to Dan Smith, Assistant United States Attorney to his address at 208 Sunset, Suite 509, Johnson City, Tennessee by placing the same in the U.S. Mail postage pre-paid.

This the 31st day of May, 1994.

/s/ David B. Hill
David B. Hill